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No. 08-385

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In The Supreme Court of the United States

VICTORY OUTREACH CENTER
AND
C. STEPHEN WHITE,

Petitioners,

v.

SERGEANT JOSEPH MELSO,
OFFICER JASON PARKER,
OFFICER JAMES CULLEN,
OFFICER ERIC FREDERICKSDORF
AND ST. JOSEPH'S UNIVERSITY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner C. Stephen White, a minister with Petitioner Victory Outreach Center, was on three separate occasions prevented from exercising his First Amendment rights while in traditional public forums within the City of Philadelphia. In each incident, Petitioner White was arrested by City police officers while peacefully standing on public sidewalks and preaching a religious message. Despite the lack of evidence to support the grounds for the arrests and the undisputed evidence that in each case police did not employ viable options for protecting Petitioners' fundamental right to speak, a jury found against the White on his claims under 42 U.S.C. § 1983 to vindicate his rights. The verdict and judgment in this case, and the Court of Appeals' failure to reverse, resulted from fundamental errors as detailed in the instant petition. The questions presented for this Court are as follows:

1. Did the jury instructions fail to adequately advise the jurors of the controlling First Amendment law by, *inter alia*, (a) failing to instruct on the "heckler's veto" principle and (b) failing to instruct that restrictions on speech must be narrowly tailored and allow alternative channels of expression?

2. Was there insufficient evidence to support the verdict of the jury because it did not show that the Petitioner was guilty of disorderly conduct or blocking public passage, such that City police were

justified in stopping the Petitioner from engaging in speech in a traditional public forum?

3. Was it error to grant a private university's motion for judgment as a matter of law where evidence was presented at trial showing that the university acted in concert with police in having the Petitioner arrested?

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PETITION FOR WRIT OF CERTIORARI

C. Stephen White and Victory Outreach Center respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is unreported and is set forth in Appendix at 1a -9a. The order of the Court of Appeals denying the Petition for Rehearing is unreported and is set forth in the Appendix at 10a-11a. The memorandum and opinion of the United States District Court for the Eastern District of Pennsylvania granting in part and denying Respondents' Motions for Summary Judgment and denying Petititoners' Motion for Summary Judgment is reported as *Victory Outreach Center, et al. v. Melso, et al.*, 313 F. Supp. 2d 481 (E.D. Pa. 2004), and is set forth in the Appendix at 12a-43a. The Memorandum and Order of the United States District Court for the Eastern District of Pennsylvania denying Respondent Saint Joseph's University's Motion for Summary Judgment is reported as *Victory Outreach Center v. Melso*, 371 F. Supp. 2d 642 (E.D. Pa. 2004), and is set forth in Appendix at 44a-56a. The order of the United States District Court for the Eastern District of Pennsylvania striking the Petitioners' Motion for a New Trial is unreported and is set forth in Appendix at 57a-58a.

STATEMENT OF JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit, which is the subject of the instant petition, was entered on May 28, 2008. The Petitioners timely filed a petition for rehearing with the Court of Appeals, which was denied in an order dated June 23, 2008. This Court has jurisdiction to review the judgment below under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law, . . ., abridging the freedom of speech . . . or the right of the people to peaceably assemble.

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]

Fed. R. Civ. P. 51(c)(1) provides:

> A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

18 Pa. Cons. Stat. Ann. § 5503 provides as follows:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior; (2) makes unreasonable noise; (3) uses obscene language, or makes an obscene gesture; or (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

18 Pa. Cons. Stat. Ann. § 5507(a) provides as follows:

> (a) Obstructing.-A person who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, ... sidewalk, ... [or] other public passage ... commits a summary offense, or in case he persists after warning by a law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this

> subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such gathering.

STATEMENT OF THE CASE

Petitioners Victory Outreach Center and C. Stephen White filed this action under 42 U.S.C. § 1983 for violations of the First and Fourth Amendments arising out of arrests without probable cause while White was communicating a religious message within public forum areas. The District Court had jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. This Court should grant the Petition to resolve a conflict among the circuits. The central issue concerns public communication and, in specific, a religious message presented within a public forum: 1) what conduct, if any, by a listening crowd constitutes disorderly conduct justifying the arrest of the speaker, 2) what constitutes blocking a public sidewalk that can form the basis of an arrest and whether it is the acts of the speaker or a listening audience which should be considered, 3) what constitutes a conspiracy between state and private actors and/or private actors acting as state actors under 42 U.S.C. § 1983, 4) what constitutes a heckler's veto, and 5) what are points of law on which a jury must be charged.

Petitioner White is the President of Victory Center Outreach, a religious organization that feeds

and helps the poor, teaches the Bible, and does evangelism and discipleship. The claims arise from three separate incidents that occurred within the City of Philadelphia.

1. On July 24, 1999, around midnight, White was arrested while carrying a sign hoisted from a holster on his belt reading "Fornicators and Drunkards will Join Tupac in Hell. Obey Jesus. 1st Corinthians 6:9." White was on a public sidewalk, 4-8 feet wide. A loud crowd was gathered on nearby South Street for a predominantly African-American Greek picnic. Respondent police officer Jason Parker believed White had the right to walk and carry the banner but arrested him for disorderly conduct under 18 Pa. Cons. Stat. Ann. § 5503 (a) because he stopped and preached. Respondent Parker was assisted in the arrest by Respondent police officer James Cullen. Although White was convicted on the charge at a hearing held that night, he appealed and the charge was dismissed.

No fights broke out, no threats were exchanged, and White made no personal insults or racial statements to those in the crowd. Parker felt some people "might take [the banner] as offensive," but he did not observe anyone taking it as offensive. Parker testified that he believed White "was not allowed to preach stationary and "had to keep moving," and Parker told White several times he had to keep moving. Although a crowd gathered near White and this created some congestion on the sidewalk, people did not push and shove White and

he did not push and shove people in the crowd. Parker told White to move to another location, but did not state where to move to.

Parker never called officers to the scene to control the crowd and did not ask the crowd to make room on the sidewalk for people to pass by White. Parker took no action regarding those pushing and shoving within the crowd except to arrest White.

2. On July 9, 2000, at 12:30 a.m., Sergeant Joseph Melso saw White on the public sidewalk abutting North Broad Street outside a McDonald's restaurant. White was standing on top of a folding chair, preaching the Christian gospel. A crowd gathered to hear White speak. The sidewalk was 15-24 feet wide; White was 16 feet in front of the restaurant and 3-4 feet from the road. White made no threats, there was no violence, and no riot broke out. Melso heard White state "Tupac Shakur is dead and burning in hell.," and someone in the crowd yelled back "fuck you and fucking that." Melso thought White was in danger as "they yelled back...either he was going to start something going with them or they were going to get...and knock him out into the street." Melso tried to talk to White, but he ignored him. Melso watched for 1-2 minutes and then asked him to move, telling White he couldn't preach. White ignored him, so Melso arrested White for obstruction of highways under 18 Pa. Cons. Stat. Ann. § 5507(a).

No crowd member ever made any effort of violence toward White because the police were there with a show of force. No one tried to strike him. Although Melso testified that he thought persons in the crowd might go after White, no one had done so prior to the time White was arrested. Melso said he could not have told the crowd to make enough room for people to pass by so he could speak without blockading of the sidewalk: "I can't tell anybody to move anywhere. I'm just trying to keep the crowd moving along nice...I keep crowds on sidewalks moving. White's actions [were] causing people to stop. He had people in front of him across the sidewalk. All these people were there blocking." Melso did not tell White to move to another location and admitted that the crowd did not threaten physical violence. The reaction of the crowd "partly" caused the arrest. Melso "did not give [White] a chance to cause a riot."

White initially was convicted of the obstruction charge. But after Melso failed to appear at the hearing on appeal, all charges against White were dismissed.

3. On March 14, 2001, Philadelphia Police Officer James Keith responded to a call of a disturbance on the highway on City Line Avenue and saw a crowd of 15-20 St. Joseph's University (SJU) students near where White was preaching. At his deposition, Keith said he and his partner told White that his being there "was raising a disruption on the sidewalk during a busy time of day, and we

instructed him that he would have to leave at that time." The incident report nowhere states that he was blocking the sidewalk. White testified that no students were in the street as he was walking back and forth along the City Line Avenue sidewalk in front of SJU preaching from the Bible from 1-4 p.m. Keith told White, "[y]ou will have to move on, we have had some complaints...leave or be arrested." White was preaching on the "barely used" sidewalk up to the light post. No one attempted to pass. A man who said he was an SJU security guard told White he had no right to do what he was doing and he would call police if White did not leave. Two officers arrived and told White that if he did not leave, he "would be taken in." Because it was getting late in the day, White left after speaking with the police.

On March 15, 2001, White returned to the main concourse at SJU to preach. White testified that he arrived at 1 p.m. and spoke on the sidewalk for 30 minutes in the same location as the day before about the Bible and Jesus Christ. Less than 20 students were 20 feet in front of White. None were on the sidewalk, on the grass behind him, or in the street. There was little traffic. No one attempted to get by him on the sidewalk. White was standing in the middle of the sidewalk. He did not keep people from passing by on the sidewalk.

Respondent Officer Eric Fredericksdorf arrived 20 minutes after White started. He told White that a complaint had been made and White would have to

"move on." White told him he had a right to speak there. Fredericksdorf told White he must go elsewhere and pointed to a parking lot far away from the sidewalk filled with cars. Fredericksdorf stated that if White stayed, he would be arrested. White said he needed to pray about it. Fredericksdorf spoke to SJU security. He did not advise the crowd to walk by but advised folks not to go out into the street. Five to ten people passed by White on the sidewalk in 5-10 minutes. When White did not move as ordered, Fredericksdorf arrested him for obstructing a public passage under 18 Pa. C.S.A. § 5507. The charges eventually were dismissed, as Fredericksdorf never appeared at the hearing on the charge.

SJU Security Officer Clifton C. Ruley saw White on March 15, 2001, and people were able to walk around the crowd gathered to hear White speak. There was 3 feet of space from White to the street side of the sidewalk for people to pass. No spectator was put in danger of physical injury.

When SJU teacher Joseph Feeney spoke to White, no on was trying to get by on the sidewalk. Ten to fifteen students stood around him, but White did not create a safety problem. SJU teacher Rick Malloy spoke to White for 5 minutes. Twenty to twenty-five students were present, and no one attempted to pass. There was sufficient room for people to pass on the sidewalk. Students blocked the sidewalk, but no one tried to walk around them or White.

4. *Court Proceedings.* After the parties' summary judgment motions were denied, Appendix C, the claims against the Respondents under 42 U.S.C. § 1983 proceeded to trial. At the close of the Petitioners' evidence, SJU moved for judgment as a matter of law on the claims against it arising from the March 2001 incident, arguing there was insufficient evidence that it acted under color of state law in causing White's arrest. A-687. Even thought it had previously entered an order denying SJU's motion for summary judgment and holding that there was sufficient evidence in the record to support the Petitioners' claim that SJU was liable for causing any deprivation of rights suffered in March 2001 as a joint actor with the police officers, 53a,-56a, the District Court granted SJU's motion. A-708-09.

Petitioners' counsel submitted instructions requesting the jury be informed that (a) there could be no arrest due to speech content unless it is fighting words, (b) religious speech has the highest amount of protection of any kind of speech, (c) leafleting religious literature is protected by the First Amendment and any police action which effectively prohibits it bears a heavy presumption against its constitutional validity, (d) a government regulation of speech is not narrowly tailored if the means chosen are substantially broader than necessary to achieve its interest, (e) time, place, and manner restrictions must be (1) unrelated to content, (2) narrowly tailored to serve a significant government interest, and (3) must allow alternate ways of communicating

the same information, A-788 and 866,[1] (f) sidewalks are a traditional public forum, A-871, (g) one person standing alone cannot blockade a sidewalk, A-872, (h) the disorderly conduct statute may not be used to punish anyone for exercising a First Amendment right, A-874, (i) calling in other officers to protect the peace is narrow tailoring, A-880, and (j) the First Amendment does not recognize the existence of a "heckler's veto." A-854 to 886. However, these instructions were not given to the jury. Counsel objected to exclusion of proposed instructions not given to the jury. A-765 to 770.

The court gave instructions with inaccurate statements of the law: 1) "if you find the restrictions were time, place and manner restrictions then you perform the following analysis a) if you find the defendant's actions were restrictions on the time, place and manner of Plaintiffs' activities b) that the restrictions were designed to further a significant government interest and c) that the restrictions were reasonable then you must find for the Defendants and against the Plaintiff" ignoring the test for public fora and narrow tailoring; 2) "Because police officers often encounter ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be of a reasonable officer." A-770 to 797.

The court ignored § 5507's language that an order to move is considered reasonable only if a police

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[1] "A" references are to pages of the Appendix filed in the Court of Appeals.

officer makes a reasonable effort to control the size and location of the crowd, saying "the law does not tell the officers how to confront the situation...If it was that simple we wouldn't be having a trial."

At the close of the evidence, Petitioners moved for a directed verdict as to each of the claims, arguing that no reasonable jury could find that the Respondents had grounds for arresting White on the disorderly conduct or obstruction charges, and as such the evidence demonstrated that the Respondents had violated the Petitioners' First and Fourth Amendment rights (A-709, A-715, and A-719). The District Court denied the motions and allowed the case to be sent to the jury. The jury thereafter returned verdicts for the Respondents on each of the claims. Immediately after the verdicts were announced, the Petitioners moved for judgment notwithstanding the verdict, which the District Court summarily denied (A-804).

On December 7, 2006, the Petitioners moved for a new trial (A-34). This motion was thereafter struck by the District Court on the basis of noncompliance with a local rule regarding the ordering of a transcript of the proceedings. 57a.

The Petitioners timely appealed the District Court judgment to the United States Court of Appeals for the Third Circuit. That Court first held that the Petitioners waived their claims regarding the sufficiency of the evidence to support the jury verdict by procedural default because of a failure to

comply with a District Court local rule regarding the ordering of a transcript. 8a. It also held that many of the Petitioners' claims that jury instructions were erroneous were not properly waived or preserved because the objection was not sufficiently distinct for purposes of Fed. R. Civ. P. 51(c)(1). 8a. As to those claims of error regarding instructions that were preserved, the Court of Appeals engaged in no analysis of those claims, but summarily held that "[b]ased on a comprehensive review of the record, we find no reversible error in the District Court's rulings on these matters." 9a. Petitioners' request for rehearing was thereafter denied. 11a.

REASONS FOR GRANTING THE WRIT

This Court should grant the instant petition in order to resolve the split among the circuit courts as to what constitutes disorderly conduct that can result in arrest for free speech activity within a public forum, what constitutes blocking public passage in the context of such speech on public sidewalks, what is the proper standard to determine whether government actions in this context are narrowly tailored, what constitutes a heckler's veto, and private actor liability under 42 U.S.C. § 1983.

I. THE JURY INSTRUCTIONS WERE ERRONEOUS AND GAVE INSUFFICIENT PROTECTION TO THE PETITIONERS' FIRST AMENDMENT RIGHT TO ENGAGE IN RELIGIOUS SPEECH IN A TRADITIONAL PUBLIC FORUM.

A. In ruling on the Petitioners' claims on appeal relating to the jury instructions, the Court of Appeals determined that many of those objections were waived because there had not been a sufficient objection under Fed. R. Civ. P. 51(c)(1). However, the record is clear that the Petitioners both proffered instructions that differed from or supplemented the charge the District Court gave (A-854 to 885) and objected to the District Court's refusal to give the requested instructions (A-765 to 770).

This was sufficient to preserve the Petitioners' claims of error as to the instructions under Fed. R. Civ. P. 51(c)(1). *See, e.g., Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 361 (5th Cir. 1995) (proposal of jury instructions does not preserve error where the party also fails to object), *Salazar v. City of Chicago*, 940 F.2d 233, 242 (7th Cir. 1991) (where party submits proposed instructions and objects to the refusal to give the instructions, a claim of error is preserved), and *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524, 1528-29 (11th Cir. 1988) (same). The Court of Appeals cited two cases in support of its waiver ruling, *Collins v. Alco Parking Corp.*, 448 F.3d 652, 656 (3d Cir. 2006) and *Alexander v. Riga*, 208 F.3d 419, 426 (3d Cir. 2000), *cert. denied*, 531 U.S.

1069 (2001), but in neither case did the party raising the error make an objection in the trial court. Indeed, in *Collins*, the court held that "'a definitive ruling from the trial court rejecting a requested instruction is sufficient to preserve the issue for appeal.'" 448 F.3d at 656 (quoting *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 276 (3d Cir. 1998). Not only did the Petitioners make a specific objection to the jury instructions, they also received a ruling rejecting their proposed instructions. Thus, they did preserve error with respect to the instructions.[2]

B. The Petitioners were severely prejudiced by the District Court's refusal to give instructions on First Amendment-related issues that were critical under the facts and circumstances of this case.

1. Heckler's Veto—The Petitioners requested an instruction that police may not arrest a speaker for disorderly conduct based upon speech unless the words used were "fighting words" or "tend to incite an immediate breach of the peace[.]" A-855. They also requested that the jury be told that the fear that speech will induce violence or a disturbance, that it would offend or cause unrest and dissatisfaction, cannot justify an arrest unless there is actual intention to incite and a clear risk of riot. A-858.

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[2] The Court of Appeals did rule that the errors raised by the Petitioners as to instructions relating to the governing First Amendment principles were preserved, 9a, so there clearly was no procedural default or waiver with respect to the challenges to those instructions.

These instructions reflect the settled principle that speech may not be punished or banned simply because it might offend a hostile mob. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992). "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). A heckler's veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience. *Startzell v. City of Philadelphia*, 533 F.3d 183, 200 (3d Cir. 2008) (citing *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966)). Only where the words are designed and intended to incite lawless action or are "fighting words," which by their very nature will incite a breach of the peace, may a person engaging in speech in a traditional public forum be silenced. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

Despite this well-established principle, the District Court rejected the Petitioners' request for an instruction that the law does not countenance a heckler's veto. An explicit instruction on this point was essential, given the testimony of the police officers who sought to justify the arrests of White on the basis of their unsubstantiated fears that White's preaching would result in a physical confrontation. Without a clear instruction that censorship of White's speech violated the First Amendment unless there was an imminent threat of violence or White

intended to incite violence, the jury was allowed to validate the arrests on the basis that the crowd was perturbed by White's speech. Moreover, such instructions were essential for the jury to understand that police censorship based upon the reactions of the crowd constituted a content-based restriction on speech that was subject to the more rigorous analysis and justification applicable to content-based restrictions. *Startzell*, 533 F.3d at 200.

The closest the District Court came to instructing on this principle was its charge that "a restriction in content-based when it is based on . . . the dislikes of the audience." 75a. But this is clearly insufficient, as shown by this Court's prior holdings on similar issues:

> The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago,* 337 U.S. 1, 4

> (1949). . . . It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," . . ., *and* that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.
>
> Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan).

Johnson, 491 U.S. at 408-09 (footnote and citations omitted). The District Court should have clearly charged the jury that, absent evidence that White's preaching was causing imminent lawless action, the police could not rely upon crowd displeasure with the content of his speech as the basis for arresting and silencing White.

By allowing the instructions given in the instant case to stand and refusing to find error, the Third Circuit has created a conflict with the decisions of other circuits with respect to the law governing a "heckler's veto." Thus, in *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1158 (9th Cir. 2007), the Ninth Circuit recognized that "[a] 'heckler's veto' is an impermissible content-based speech restriction where the speaker is silenced due to an anticipated disorderly or violent reaction of the audience." Similarly, the Seventh Circuit has held in a case involving similar facts that it is improper to silence the speaker whose message is controversial:

> "Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement,* 505 U.S. 123, 134 (1992). "Speech cannot ... be punished or banned, simply because it might offend" those who hear it. *Id.* at 134-35. It cannot be denied that drivers who yelled, gestured, and slammed on their brakes when they saw Ovadal's signs created a safety hazard on the Beltline. However, it is the reckless drivers, not Ovadal, who should have been dealt with by the police, perhaps in conjunction with an appropriate time, place, and manner restriction on Ovadal. The police must preserve order when unpopular speech disrupts it;

> "[d]oes it follow that the police may silence the rabble-rousing speaker? Not at all. ***The police must permit the speech and control the crowd; there is no heckler's veto.***" *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1299 (7th Cir.1993).

Ovadal v. City of Madison, Wisconsin, 416 F.3d 531, 537 (7th Cir. 2005) (emphasis added).

2. White's Presence on a Public Sidewalk. The Petitioners also requested instructions concerning the fact that White's preaching took place on a public sidewalk. One such instruction would have told the jury that "[p]ublic streets and sidewalks, long used for public assembly, debate and expressive activities are a traditional public forum." A-871. Additionally, an instruction was requested correctly charging that a regulation or limit on expression in a traditional public forum is sharply circumscribed: it may only regulate content if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that interest. A-860; *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S.37, 45 (1983). The Petitioners also requested a charge that content-neutral time, place or manner regulations of speech in a public forum are valid only if narrowly tailored to serve a significant government interest and leave open alternative channels of communication. A-866; *Perry*, 460 U.S. at 45. An instruction also was requested defining "narrow tailoring" as government action that is "not

substantially broader than necessary to achieve the government's interest." A-865; *Ward v. Rock Against Racism*, 491 U.S. 781, 800 (1989).

However, the District Court's instructions failed to adequately inform the jury of these principles. For example, the court charged that "if you find that the defendants' actions were restrictions on time, place and manner of the plaintiff's activity, and, . . . that the restrictions were designed to further a significant interest, and . . ., that the restrictions were reasonable, then you must find for the defendants and against the plaintiff." 76a. This instruction wholly omitted to tell the jury that it must also be narrowly tailored and leave open alternative channels of communication. *Perry*, 460 U.S. at 45. Additionally, although the District Court mentioned that a *content*-based regulation must be "narrowly drawn," it failed entirely to inform that this requirement also applies to any time, place and manner regulation or speech or to give the jury a definition of "narrow tailoring."

These omissions were clearly prejudicial to the Petitioners because a crucial aspect of their claims was that the Respondent police officers failed to attempt to control the crowds that had gathered to hear White preach. Again, when speech is unpopular and threatens disruption, "[t]he police must permit the speech and control the crowd; there is no heckler's veto.'" *Ovadal*, 416 F.3d at 537 (quoting *Hedges*, 9 F.3d at 1299).

3. *Fighting Words Instruction.* The Petitioners also requested that the jury be charged that police may not arrest for disorderly conduct under 18 Pa. Cons. Stat. Ann. § 5503 "unless the words were fighting words, words that by their very utterance inflict injury or tend to incite an immediate breach of the peace; the words must do more than bother the listener; rather, they must be nothing less than an invitation to exchange fisticuffs." A-855.

This is an accurate definition of "fighting words." The charge was relevant to this case, given the fact that Respondent Parker arrested White for disorderly conduct in the first incident because of the crowd's apparent displeasure with his message. Indeed, a disorderly conduct statute must be narrowly drawn and applied so as not to censor protected expressive activity. *Gilles v. Davis*, 427 F.3d 197, 204 (3d Cir. 2005) (citing *Gooding v. Wilson*, 405 U.S. 518, 522 (1972)). *See Johnson v. Campbell*, 332 F. 3rd 199, 212 (3rd Cir. 2003) (disorderly conduct statute, as applied to speech activities, must be read to apply only to fighting words). In *Gilles*, 427 F.3d at 205, the Third Circuit held that police did not have probable cause to arrest a street preacher under § 5503 (a) where the language he used, while provocative and challenging to a crowd, did not constitute "fighting words." White's language was even less insulting than that involved in *Gilles*; it was clearly protected speech, and the jury should have been informed of that fact in determining whether White's speech was protected and his arrest was unjustified.

The charge given the jury did not include this fighting words instruction, and actually could have influenced the jury to find that White's speech was unprotected and could be cut off by the police. The District Court instructed the jury that "[t]he law allows for reasonable regulation of First Amendment rights by governmental authority that preserves peace, order and tranquility. The government has a strong stake in preserving the peace, protecting its citizens and maintaining public safety." 75a. Clearly, speech may not be silenced under a disorderly conduct statute simply because it upsets the public peace, order, or tranquility. It is protected even if it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may be proscribed and punished only when it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. *Johnson*, 491 U.S. at 409.

This charging error and the others set forth above demonstrate that the jury made its decision on the basis of flawed legal principles. The validity of the jury's decision is wholly undermined by the District Court's failure to instruct the jury in a way that gave sufficient protection to the Petitioners' fundamental rights to free expression and to be free from unreasonable seizures. By affirming the District Court judgment, the Third Circuit has brought its jurisprudence into conflict with that of this Court and other Circuits. A writ of certiorari

should issue to correct this error and protect the rights of the Petitioners and others who may seek to exercise their First Amendment rights.

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS THAT THE RESPONDENTS DID NOT VIOLATE THE PETITIONERS' FIRST AND FOURTH AMENDMENT RIGHTS.

That Petitioner White was engaged in expressive activity protected by the First Amendment at the time he was arrested on the three occasions at issue here has never been challenged in this case. "Indeed, [his] speech addressing religious matters is speech of the highest constitutional order. *See DeBoer v. Vill. of Oak Park,* 267 F.3d 558, 570 (7th Cir. 2001) (citing *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 760 (1995))." *Deida v. City of Milwaukee*, 192 F.Supp.2d 899, 907 (E.D.Wis. 2002). If he had been arrested without just cause, the arrest would violate his rights under both the First and Fourth Amendment. An arrest that arises out of the arrestee's exercise of his right to free speech that is not a valid arrest violates the arrestee's First Amendment right and his right under the Fourth Amendment to be free of arrests without probable cause. *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997).

The overwhelming evidence at trial demonstrated that the Petitioners' constitutional

rights were violated because the Respondent police officers could not have had probable cause to believe White violated the criminal statutes that were the purported grounds for his offenses. Although each statutory offense contains an exemption that specifically applied to and protected White's expressive activity, this was ignored by the jury in reaching its verdict. Recognizing that no reasonable jury could have concluded that there was probable cause to arrest White on each occasion, the Petitioners moved for a directed verdict at the close of the evidence, which the trial court erroneously denied (A-709, 715, and 719). After the jury returned adverse verdicts, the Petitioners again requested that the trial court cure the error by moving for judgment notwithstanding the verdict, which also was denied (A-804).

Despite the Petitioners' efforts to obtain a ruling on the sufficiency of the evidence supporting the verdicts, the Court of Appeals refused to review the Petitioners' sufficiency claims, holding that the claims were waived because the Petitioners had not complied with a local rule in requesting a transcript in support of a motion for a new trial. 8a. This ruling ignored settled law establishing that the claims regarding the sufficiency and weight of the evidence to support the verdicts was properly preserved by the Petitioners' motions for a directed verdict and for judgment notwithstanding the verdict.

A. *Preservation of Error in the Verdicts.* The Court of Appeals held that because the Petitioners

had not adequately preserved their motion for a new trial, any claims of error respecting the weight or sufficiency of the evidence were waived. 8a. But this erroneously assumes that a claim that a verdict is contrary to the evidence is adequately raised only by a motion for a new trial.

As this Court pointed out in *Unitherm Food Systems, Inc. v. Swift-Ekrich, Inc.*, 546 U.S. 394, 406-07 (2006), a claim of error regarding the sufficiency of evidence to support a jury verdict is preserved by making a motion for judgment as a matter of law at the close of the evidence and then renewing that motion after the verdict is returned and within ten days of the entry of judgment. The Third Circuit has similarly recognized that a timely motion for judgment notwithstanding the verdict will suffice to preserve error regarding the sufficiency of evidence supporting a jury verdict. *Charles Jacquin et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 475 (3d Cir. 1990).

The Third Circuit erroneously relied upon the decision in *Hewlett v. Davis*, 844 F.2d 109 (3d Cir. 1988) in holding that the Petitioners had procedurally defaulted on their claims challenging the verdict. While *Hewlett* did find procedural default as to a claim of error regarding a motion for a new trial, it also pointed out that "Local rule 20(e) provides for dismissal only of the *motion* and not of the action. Objections to rulings made at trial are ripe for review upon appeal from a final order whether or not they are raised on motion for a new

trial. *Trout v. Pennsylvania R. Co.*, 300 F.2d 826 (3d Cir.1962)." *Hewlett*, 844 F.2d at 115 n. 3 (emphasis in original). Here, the Petitioners did raise their objections to the sufficiency of the evidence to support the jury verdicts at trial, and so they were properly preserved for appeal.

B. *Sufficiency of the Evidence*. The standard when considering a motion for a directed verdict or judgment notwithstanding the verdict under Fed. R. Civ. P. 50 is whether, under the governing law, there can be but one reasonable conclusion as to the verdict and that verdict should have been for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A court must determine whether the record contains the minimum quantum of evidence from which a jury might reasonably have reached the verdict it returned. *Keith v. Truck Stops Corp. of America*, 909 F.2d 743, 745 (3d Cir. 1990).

1. July 24, 1999 Incident—In the first incident, White was arrested by Respondents Parker and Cullen for disorderly conduct under 18 Pa. Cons. Stat. Ann. § 5503 (a). For this offense, it must appear that the person charged, acting with the intent to cause public inconvenience, annoyance, or alarm or recklessly creating a risk thereof, did one of the following: (1) engaged in fighting or threatening or in violent or tumultuous behavior; (2) made unreasonable noise; (3) used obscene language or made an obscene gesture; or (4) created a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor. Clearly,

White was not engaged in obscene actions and was not engaged in fighting, threatening, violent, or tumultuous behavior. Furthermore, there is no basis for a determination that White was making "unreasonable noise" because he was in the midst of a large, boisterous throng that was loud in its own right. 14a. The jury simply could not have found that there was probable cause to arrest White under prongs (1) through (3) of the disorderly conduct statute.

Indeed, the only basis Respondents Parker and Cullen identified as the basis for arresting White was prong (4) of the disorderly conduct statute. 14a-15a, 26a. But this aspect of the disorderly conduct statute applies only if the arrestee is engaged in an act "which serves no legitimate purpose of the actor." *Id.* Clearly, White had a legitimate purpose in being on the sidewalk and preaching; he was exercising his fundamental right of expression in a place which has "'immemorially been held in trust for the use of the public, and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Perry*, 460 U.S. at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). White's religious speech was at the core of what the First Amendment protects. *Ovadal*, 416 F.3d at 536.

There was simply no evidence upon which the jury could conclude that White's conduct on the evening of July 24, 1999, violated Pennsylvania's disorderly conduct statute. As a matter of law, White

was engaged in conduct that served his legitimate interest in preaching the Christian gospel to the world. Even if Parker and Cullen were mistaken as to whether White's speech was protected by the First Amendment, their mistake was not reasonable and did not give them probable cause to arrest White. *See Johnson v. Campbell*, 332 F.3d 199, 213 (3rd Cir. 2003) (officer's misunderstanding that uttering profane words alone violated disorderly conduct statute did not serve to give officer probable cause to arrest). Moreover, the reactions of others to White's speech did not make his conduct criminal or justify the police officers' arrest of him; the officers should have controlled the crowd and not silenced the speaker. *Ovadal*, 416 F.3d at 537.

2. July 9, 2000 Incident—The second arrest at issue here occurred at the following year's Greek Picnic in the City of Philadelphia. Respondent Melso arrested White for obstructing a public passage in violation of 18 Pa. Cons. Stat. Ann. § 5507(a). Melso testified that he saw White standing on a chair that was on a public sidewalk approximately 20 feet wide. A crowd had gathered to hear White speak. Although Melso testified that he perceived a risk to safety due to the crowd's growing animosity, 16a-17a, 28a, he did not arrest White for disorderly conduct. Instead, based upon the impediment to pedestrian traffic caused by the gathered crowd and White's refusal to move after Melso told White five times to move, Melso arrested White for obstructing a public passage. 17a.

Again, the jury's verdict flies in the face of the provisions of the controlling statute, which clearly provides that "[n]o person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak." 18 Pa. Cons. Stat. Ann. § 5507(a). White was arrested by Melso precisely because of the gathering of a crowd to hear him speak. There is no evidence whatsoever that White individually blocked passage on this sidewalk. The sole evidence before the jury was that any obstruction was caused by the gathering of persons to hear White speak. 17a; 28a. Contrary to the provisions of § 5507(a), White was arrested solely because of a gathering of persons to hear him speak. Plainly, Respondent Melso did not have probable cause to arrest White under the obstruction statute.

3. March 15, 2001 Incident—White's arrest by Respondent Fredericksdorf also was for obstructing a public passage in violation of 18 Pa. Cons. Stat. Ann. § 5507(a). Again, Fredericksdorf himself testified that the obstruction was the result of a crowd gathered around White to hear him speak. 18a, 29a. The obstruction statute plainly does not make a speaker exercising his First Amendment rights in a traditional public forum liable for any obstruction caused by those who gather to hear him speak. Fredericksdorf had no grounds for arresting White for obstructing the sidewalks near SJU.

Each arrest at issue in this case was improper, as the Respondent police officer should have known that the statute under which the arrest was made did

not cover White's conduct. This is not a situation where the officer was mistaken as to the applicable facts; in each case, the police applied the statutes under circumstances to which the statutes were inapplicable as a matter of law. The warrantless arrests of White without probable cause not only violated his Fourth Amendment right to be free of unreasonable seizures, *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004), but violated his right to free expression under the First Amendment. *Sandul*, 119 F.3d at 1256.

III. DISMISSAL OF SJU AT TRIAL WAS ERROR BECAUSE THERE WAS EVIDENCE OF A CONSPIRACY FOR WHICH SJU COULD BE LIABLE UNDER 42 U.S.C. § 1983.

It also was error to dismiss SJU from the action at the close of the evidence. As pointed out above, a motion for a directed verdict may be granted if, under the governing law, there can be but one reasonable conclusion as to the verdict and that verdict should have been for the moving party. *Anderson* 477 U.S. at 250. A court must determine whether the record contains the minimum quantum of evidence from which a jury might reasonably have reached the verdict it returned. *Keith*, 909 F.2d at 745.

A private actor who conspires with a police officer to deprive a person of constitutional rights is liable as a state actor under § 1983. *Adickes v. S. H.*

Kress & Co., 398 U.S. 144 (1970). If a private actor is a willful participant in joint activity with the state actors, the private actor can be liable for a deprivation of constitutional rights. *U.S. v. Price*, 383 U.S. 787, 794 (1966); *Darr v. Wolfe*, 767 F.2d 79, 80 (3rd Cir. 1988).

In this case, the evidence showed that on March 14, 2001, SJU staff was told by the Dept. of Safety and Security to "bring literature from...religious groups" in lot "which refused to move...from group to office." The evidence also shows that the literature and message White preached near SJU challenged the Catholic beliefs of the university. Thereafter, White was told by SJU security staff to leave and move off the public sidewalks. Another SJU guard threatened White and told him he had no right to preach on the public sidewalk. Additionally, White and a companion saw SJU security personnel speaking with the police 10-15 minutes on both March 14 and 15.

Based on this evidence, a jury could have concluded that SJU ordered security guards to contact City Police and convince them to arrest White and remove him from the public sidewalk abutting SJU. *See Bang v. Utopia Restaurant*, 923 F.Supp. 46, 49 (S.D.N.Y.,1996) (calling the police in conjunction with extended conversation between private party and the police could be found to be joint action sufficient to hold private party liable under § 1983). Therefore, it was error for the courts below to allow SJU to be dismissed from the action.

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

VICTORY OUTREACH CENTER
AND
C. STEPHEN WHITE,

Petitioners,

v.

SERGEANT JOSEPH MELSO,
OFFICER JASON PARKER,
OFFICER JAMES CULLEN,
OFFICER ERIC FREDERICKSDORF
AND ST. JOSEPH'S UNIVERSITY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

APPENDIX

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1927

VICTORY OUTREACH CENTER
and C. STEPHEN WHITE,
Appellants,

vs.

SERGEANT JOSEPH MELSO, OFFICER JASON PARKER, OFFICER JAMES CULLEN, OFFICER ERIC FREDERICKSDORF, and ST. JOSEPH'S UNIVERSITY,
Appellees.

On Appeal from the United States District Court For the Eastern District of Pennsylvania
(No. 00-CV-5185)
District Judge: Honorable Petrese B. Tucker.

Submitted on May 16, 2008

Before: McKEE, GARTH, *Circuit Judges*, and IRENAS,* District Judge.
(Opinion Filed: May 28, 2008)

OPINION

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*Hon. Joseph E. Irenas, Judge, United States District Court for the District of New Jersey, sitting by designation.

GARTH, *Circuit Judge*:

Victory Outreach Center and C. Stephen White ("Plaintiffs" or "Appellants") appeal from the District Court's final order of February 28, 2007, dismissing Plaintiffs' motion for a new trial and motion to extend time based on a failure to order a trial transcript as required under Local Rule 7.1(e) of the District Court for the Eastern District of Pennsylvania. Appellants challenge the sufficiency of evidence, twenty-three of the District Court's jury instructions, exclusion of evidence, and use of leading questions. For the following reasons, we affirm.

I.

On October 12, 2000, plaintiffs Victory Outreach Center and C. Stephen White ("Plaintiffs") filed a complaint against several Philadelphia police

officers-Sergeant Joseph Melso, Officer Jason Parker, Officer James Cullen, Officer Eric Fredricksdorf (Police Defendants")-the City of Philadelphia ("City"), and St. Joseph's University ("SJU"). The complaint alleged that White was arrested for preaching religious messages on three occasions in violation of his rights under the First and Fourth Amendments.

The first incident occurred on July 24, 1999 at a "Greek Picnic," during which thousands of members of fraternities and sororities assemble in Philadelphia every July. At night, the college students gathered on South Street, such that they were "lumped together like cattle" over a fourteen-block span. A-R at 117. To maintain security and public order, there was a significant police presence assigned to this area. Late that evening, White stood on the sidewalk on South Street and carried a five-foot banner, which proclaimed: "Fornicators and Drunkards will Join Tupac in Hell. Obey Jesus. 1st Corinthians 6:9."Because White was blocking the sidewalk and causing a crowd to gather around him due to his slogans and shouting, Officer Parker told him to keep moving like the rest of the crowd. After White ignored the police officer's request, he was arrested and issued a citation for disorderly conduct. White received a hearing that night, was found guilty, and released. White appealed the conviction and the charges were eventually dismissed.

The second incident occurred the following year on the night of July 9, 2000, also during a Greek Picnic, at around 12:30am. In a part of Philadelphia

where fifteen to twenty thousand students had gathered, White again stood on a sidewalk and began to preach and yell various slogans. About 70 people had assembled in front of White, which impeded pedestrian traffic. Sergeant Melso asked White to leave approximately five times but without success. Perceiving a risk to public safety due to an escalating animosity between White and the crowd, Melso arrested White, who was subsequently convicted of a summary offense and released. On appeal, the charges against White were dismissed due to Melso's failure to appear at White's trial, apparently because he did not receive notice of the hearing.

The third incident took place on March 15, 2001 in the afternoon at St. Joseph's University. White's preaching, which included loud screaming and yelling, assembled a crowd of twenty to twenty-five people around him. The gathered crowd blocked the sidewalk and students began walking into traffic. Officer Fredericksdorf, who arrived at the scene, suggested to White that he move to an adjacent parking lot where there was no problem with heavy traffic. Since White refused to move after several requests, Fredericksdorf arrested him on charges of blocking or obstructing a highway or public passageway and issued him a summary citation. At White's subsequent hearing, the charges against him were dismissed due to Fredericksdorf's failure to appear at the hearing, apparently because he did not receive notice of it.

On October 10, 2001, Plaintiffs filed an amended complaint, which the Police Defendants and the City answered. On July 16, 2003, Plaintiffs sought leave to file a second amended complaint, which the District Court denied. On September 8, 2003, Plaintiffs moved for summary judgment; the Police Defendants and the City responded and cross-moved for summary judgment on October 6, 2003. The District Court granted summary judgment to the City on March 22, 2004 and dismissed the City from the case for failure of the Plaintiffs to establish independent municipal liability, but denied summary judgment to Plaintiffs and the Police Defendants.

A jury trial commenced on November 7, 2006 and finished on November 16, 2006. On the fourth day of trial, the District Court granted SJU's motion for directed verdict pursuant to Federal Rule of Civil Procedure 50 and dismissed SJU from the case. The District Court also dismissed Plaintiffs' claim of malicious prosecution against the Police Defendants, but denied the remainder of their Rule 50 motion in favor of sending the case to the jury. After three hours of deliberation, the jury returned a verdict in favor of all Police Defendants.

On December 7, 2006, Plaintiffs filed a motion for new trial and SJU moved to strike the motion based on Plaintiffs' failure to order a trial transcript. Pursuant to Local Rule 7.1(e) of the District Court for the Eastern District of Pennsylvania, the District Court granted SJU's motion on February 28, 2007.

Plaintiffs filed a timely notice of appeal on March 27, 2007.

II.

We have jurisdiction under 28 U.S.C. § 1291, which provides appellate jurisdiction from all final decisions of U.S. district courts. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, which confers jurisdiction over federal questions.

We review a motion for a new trial for " 'abuse of discretion unless the court's denial of the motion is based on application of a legal precept, in which case our review is plenary.'" *Curley v. Klem*, 499 F.3d 199, 206 (3d Cir.2007) (quoting *Honeywell, Inc. v. American Standards Testing Bureau, Inc.*, 851 F.2d 652, 655 (3d Cir.1988)). We review jury instructions for abuse of discretion to determine whether they are misleading or inadequate, though we exercise plenary review over whether jury instructions, read as a whole, misstate the law. *Woodson v. Scott Paper Co.*, 109 F.3d 913, 929 (3d Cir.1996). A district court's refusal to use a proposed jury instruction is reviewed for abuse of discretion. *United States v. Khorozian*, 333 F.3d 498, 507-08 (3d Cir.2003). Similarly, decisions to admit or exclude evidence are reviewed for abuse of discretion. *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 412 (3d Cir.2002). We also review for abuse of discretion a trial court's decision regarding the use of leading questions. *Government of Virgin Islands v. Brathwaite*, 782 F.2d

399, 406 (3d Cir.1986)."To demonstrate an abuse of discretion, in connection with an evidentiary ruling, a party must show that the District Court's decision was arbitrary, fanciful or clearly unreasonable."*Moyer v. United Dominion Industries, Inc.*, 473 F.3d 532, 542 (3d Cir.2007) (internal quotation marks omitted).

If a party fails to adequately object to a jury instruction, we review for plain error instructions affecting substantial rights. *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 339 (3d Cir.2005). Thus, we will reverse a trial court's rulings only where a plain error was "fundamental and highly prejudicial, such that the instructions failed to provide the jury with adequate guidance and our refusal to consider the issue would result in a miscarriage of justice."*Id.* at 341.

We have plenary review over a district court's grant of judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. "[A] directed verdict is mandated where the facts and law will reasonably support only one conclusion."*McDermott Int'l., Inc. V. Wilander*, 498 U.S. 337, 356, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

III.

Appellants raise numerous issues with respect to the sufficiency of evidence, twenty-three of the District Court's jury instructions, exclusion of evidence, and use of leading questions.

Since the District Court properly dismissed White's motion for a new trial for lack of prosecution pursuant to Local Rule 7.1(e),[1] Appellants' arguments regarding sufficiency of evidence were waived by procedural default.*Hewlett v. Davis*, 844 F.2d 109, 115, n. 3 (3d Cir.1988). With respect to Appellants' challenges to the jury instructions, all except three of these issues were waived by the Plaintiffs because they were not "properly raised and preserved at the trial level."*Id.* Under Federal Rule of Civil Procedure 51(c)(1), a "party who objects to an instruction or the failure to give an instruction must do so on the record, stating *distinctly* the matter objected to and the grounds for the objection."(emphasis added). Though White raised a general objection to the court's jury instructions and proposed alternative instructions, such acts were insufficient to preserve on appeal all potential challenges to the instructions. *See, e.g., Collins v. Alco Parking Corp.*, 448 F.3d 652, 656 (3d Cir.2006) ("[M]erely proposing a jury instruction that differs from the charge given is insufficient to preserve an objection."); *Alexander v. Riga*, 208 F.3d 419, 426 (3d Cir.2000).

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[1] Local Rule 7.1(e) provides: "Within fourteen (14) days after filing any post-trial motion, the movant shall either (a) order a transcript of the trial by a writing delivered to the Court Reporter Supervisor, or (b) file a verified motion showing good cause to be excused from this requirement. Unless a transcript is thus ordered, or the movant excused from ordering a transcript, the post-trial motion may be dismissed for lack of prosecution."

The remaining issues preserved on appeal relate to the District Court's instructions regarding First Amendment law, in particular the issue of the so-called "heckler's veto," status of the sidewalk as a public forum, and charge on punitive damages. Based on a comprehensive review of the record, we find no reversible error in the District Court's rulings on these matters. Similarly, we find no error in the District Court's Rule 50 directed verdict in favor of SJU. Turning to Appellants' challenges to the District Court's exclusion of certain evidence and its handling of allegedly leading questions, we find that the District Court did not abuse its discretion in ruling against the Plaintiffs.

IV.

For the foregoing reasons, we affirm the District Court's order of February 28, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-1927

VICTORY OUTREACH CENTER
and C. STEPHEN WHITE,
Appellants,

vs.

SERGEANT JOSEPH MELSO, OFFICER JASON PARKER, OFFICER JAMES CULLEN, OFFICER ERIC FREDERICKSDORF, and ST. JOSEPH'S UNIVERSITY,
Appellees.

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and GARTH* Circuit Judges and IRENAS* District Judge

The petition for rehearing filed by Appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, or for filing of an answer, and a majority of the circuit judges in regular active service not having voted for rehearing by the court *en banc* or for filing of an answer, the petition for rehearing and for filing of an answer is DENIED.

BY THE COURT:
/S/ Leonard I. Garth
LEONARD I. GARTH
United States Circuit Judge

DATED: June 23, 2008
tyw/cc: J. Michael Considine Jr., Esq.
Kelly S. Diffily, Esq.
Eleanor N. Ewing, Esq.
David P. Karamessinis, Esq.

*Honorable Leonard I. Garth, Senior Circuit Judge, and Honorable Joseph E. Irenas, Senior District Judge, as to Panel Rehearing only.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORY OUTREACH, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
SERGEANT MELSO, et al.	:	NO. 00-5185

MEMORANDUM AND ORDER

HUTTON, S.J. March 22, 2004

Presently before the Court are Plaintiffs' Motion for Summary Judgment (Docket No. 64), Defendants the City of Philadelphia, Sergeant Joseph Melso, Police Officer Jason Parker, Police Officer James Cullen, and Police Officer Eric Fredericksdorf's Opposition to Plaintiffs' Motion for Summary Judgment and Municipal Defendants' Cross-Motion for Summary Judgment (Docket No. 68), and Plaintiffs' revised reply thereto (Docket No. 73).

I. BACKGROUND

Plaintiffs C. Stephen White ("White") and Victory Outreach Center[1] filed the instant suit against Defendants Police Officer James Cullen

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[1] The name "Victory Outreach" was changed to the "Philadelphia Gospel Outreach Center." The entity is an inner-city mission and White is currently its sole employee.

("Cullen"), Police Officer Jason Parker ("Parker"), Sergeant Joseph Melso ("Melso"), Police Officer Eric Fredericksdorf ("Fredericksdorf"), the City of Philadelphia ("City" or "Philadelphia") (collectively "the Municipal Defendants"), and St. Joseph's University, alleging infringement of White's First and Fourth Amendment rights pursuant to 42 U.S.C. § 1983.

This suit revolves around three incidents, two of which occurred during the Greek Picnics on July 24, 1999 and July 9, 2000, and the third at St. Joseph's University on March 15, 2001.

Plaintiff White is a minister and evangelist who believes that it is his mission to bring his message of the gospel to college students on campuses in the Philadelphia area and at the annual Greek Picnic. According to White, the Greek Picnic is a predominantly African-American event involving college students that takes place in Philadelphia every July. After the picnic, the celebrants "descend down to South Street," where the crowds can grow to "25,000 people there all over South Street, [and] all up and down Broad Street." C. Stephen White Dep., May 19, 2001, at 15 (Docket No. 69, Ex. A) [hereinafter "White I"].

A. <u>July 24, 1999 Incident at Greek Picnic</u>

On the night of Saturday, July 24, 1999, White traveled to South Street to "preach the word of God" to the predominantly African-American Greek Picnic

crowd of teens and college age individuals gathered in the South Street corridor. Id. at 16 (Docket No. 69, Ex. A). White brought with him a four foot by six foot banner that read "Fornicators and drunkards will join Tupac in hell. Obey Jesus. I Corinthians 6:9." Id. at 17-18. The banner was to be attached to an eight foot high pole, which White would then attach to his waist and carry like a flag.

The South Street corridor was a "madhouse. It was so packed with people." Id. at 20. White parked his car around Fifth Street and walked down to Second Street. Due to the large crowd in the area, it took White ten minutes to walk from Fifth Street to Second Street. When he arrived at the intersection of Second and South Streets, White unfolded the banner and hoisted it up. The crowds forced White onto Second Street.

Standing on Second Street, White began to preach and "reiterat[ed] what the banner said." Id. at 41. According to White, he was speaking a little bit louder than normal and ten to twenty individuals gathered around him out of curiosity. About five individuals from the crowd engaged him in conversation. The police asked White to "move on or ... be arrested" only once while he was on Second Street. See White I Dep., at 44. After that, White contends that the police "went hysterical" and thought the crowd was "hostile and erratic." Id. at 44-45. White contends that he didn't sense that from the crowd. White refused to move and the police subsequently arrested him.

According to Officer Parker, he saw White walking down Second Street with the banner and yelling into the crowd. Officer Parker observed approximately fifty to sixty individuals, mostly African-Americans in their twenties, around White. White's "preaching ... caused a large crowd to gather, very loud and boisterous, and [White] was blocking the passageway of the sidewalk." Jason Parker Dep., at 28 (Docket No. 69, Ex. D); see also James Cullen Dep., at 14 (Docket No. 69, Ex. C) ("I heard people complaining within the crowd in reference to the sign ... they were basically upset about the sign."). White "incited the crowd, refused to move, blocked the pavement and made it unsafe for police, himself and other people out there." Cullen Dep., at 30 (Docket No. 69, Ex. C). Officer Parker asked White to continue his activities at another location to relieve the congestion. White did not move. Officer Parker, fearing the situation could turn into something violent, then arrested White for disorderly conduct under 18 Pa. Cons.Stat. Ann. § 5503.

At a hearing held that same night, White was found guilty of disorderly conduct. White appealed and the charges against him were later dismissed.

B. July 9, 2000 Incident at Greek Picnic

The next year, on July 9, 2000, White went to a second Greek Picnic to spread his message. Because the traffic around the South Street corridor was "so bad," White traveled to Broad and Diamond

Streets, another location where Greek Picnic participants gathered. White walked to the McDonald's restaurant on 2100 North Broad Street, stood on a chair, and began preaching.

According to White, he only preached for about two minutes before he was arrested. During those two minutes, approximately ten individuals gathered around him but no one engaged him in conversation. White maintains that he never told the crowd that "Tupac was dead in hell" and that the police only asked him to move from his position "probably once," to which White responded that he had the First Amendment right of freedom of speech. See White I, at 60 (Docket No. 69, Ex. A).

Sergeant Melso was assigned to patrol the area around Broad and Diamond Street during this Greek Picnic celebration. According to Sgt. Melso, White stood on a folding chair and was yelling into the crowd of approximately seventy individuals that had gathered around him. As Sgt. Melso approached the McDonald's restaurant, White started to get louder. Sgt. Melso asked White to move because White was blocking the pavement. At that point, White "started yelling the Tupac Shakur thing was dead and burning in hell inciting the crowd up." See Joseph Melso Dep., at 30 (Docket No. 69, Ex. D). "[T]he crowd was primarily African-American. When [White] started saying Tupac Shakur was dead in hell the crowd start[ed] yelling back at him." Id. at

35.[2] Sgt. Melso was also concerned that "people couldn't get through the crowd [and] would have to walk out into the street to get around [White]." Id. at 37. Concluding that the situation could potentially lead to a riot, and after asking White to relocate five times with no result, Melso arrested White for obstruction of highways and other public passages, in violation of 18 Pa. Cons.Stat. Ann. § 5507.

C. March 15, 2001 Incident at St. Joseph's University

White also preached at local college campuses such as the University of Pennsylvania, Temple University, and Drexel University. On March 14, 2001, White preached at St. Joseph's University, a Catholic school, for the first time. White stood on the "main concourse" along City Line Avenue and addressed the students. On that day, White claims that approximately forty students and other individuals gathered around him. Because there had been complaints what White was "offending students," the police were called and asked White to move on. See White Dep., June 27, 2003, at 72 (Docket No. 69, Ex. B) [hereinafter "White II"]. After speaking to the police, and because it was getting late in the day, White agreed to leave.

White returned to the main concourse of St. Joseph's University the next day, on March 15, 2001.

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[2] According to Sgt. Melso, Tupac Shakur is a "very well respected person within the African-American community." Id. at 62.

In his first deposition, White states that about ten students assembled around him. See White I, at 82-84. In his second deposition, White states that no one gathered around him and that approximately four to five students listened to him from a distance. See White II, at 82. While preaching, White used physical gestures that included bending down and lunging forward. See White II, at 43-44, 79-80; Ex. 1 of White II (Docket No. 69, Ex. B). Approximately half an hour later, Officer Fredericksdorf approached White and asked White to move to another location by a parking lot. According to White, Officer Fredreriksdorf stated that there were complaints that White was offending students and asked White to move or be arrested. In response, White stated that he prayed and believed that he needed to continue preaching at the same location. See White II, at 88. At that point, White was placed under arrest.

According to Officer Fredericksdorf, on March 15, 2001, about twenty to twenty-five individuals were assembled near White. White was preaching and "yelling something about the girls were Catholic whores." See Eric Fredericksdorf Dep., at 48 (Docket No. 69, Ex. F). Some students shouted back at White in response. Officer Fredericksdorf also observed that White was blocking the sidewalk and that individuals were "entering the street to circumvent" White. See Fredericksdof Dep., at 44-45. Further, the Officer saw a lot of cars stopping in the middle of the street to observe White instead of the traffic pattern. Officer Fredericksdorf concluded

that this was an unsafe situation and asked White to continue preaching at a "location more advantageous for public safety." See Fredericksdorf Dep., at 88. When White refused, Officer Fredericksdorf arrested White for obstructing the highway and public passageways, in violation of Pa. Cons.Stat. Ann. § 5507.

D. First Amendment Training in the Police Department

Police recruit training at the Philadelphia Police Department consists of fourteen hundred hours over a ten month period. Of those hours, about two hours are devoted to teaching recruits about the First Amendment.[3]

In 1995, the City of Philadelphia implemented the First Amendment Lesson Plan in accordance with an agreement to settle the matter of Lickteig v. Landauer, Civil Action No. 91-1843. The framers of the Lickteig settlement, including White's counsel, drafted a Basic Outline of First Amendment Law ("Basic Outline"). A copy of the Basic Outline is given to each police recruit and the Lickteig settlement is referred to in First Amendment recruit training. The City's First Amendment Lesson Plan is in addition to Pennsylvania's required Civil and Criminal Liability course, which also includes information on First Amendment law.

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[3] In contrast, about fourteen hours is spent teaching about search and seizure. *See* Arthur Grover Dep., at 26 (Docket No. 69, Ex. G).

Additionally, the Police Department implemented Directive 94 in June 1999. Directive 94 and its Appendix A address "street speeches and meetings." See Phila. Police Dept. Directive 94 (Docket No. 69, Ex. H). Specifically, the Directive recognizes an individual's right to make a speech in a public location subject to certain limits, while at the same time protects the general public safety. See Phila. Police Dept. Directive 94, Appendix A (Docket No. 69, Ex. H). A copy is distributed to all police officers.

The Police Department also provides existing officers with yearly in-service training pursuant to state law. Although Pennsylvania did not mandate First Amendment training to existing officers during the period 1995 through August 2001, the City incorporated First Amendment training beginning in 1995. Further, the City taught First Amendment Law to all police officers in the year 2000 and provided a hand-out to all officers. Officers who were assigned to the Republican National Convention were provided with additional First Amendment training.

Sgt. Melso received First Amendment training consistent with Directive 94 at the Philadelphia Police Academy and during in-service update training. Police Officers Cullen, Parker, and Fredericksdorf received First Amendment training consistent with Directive 94 and the Basic Outline of First Amendment law.

On October 12, 2000, White initiated this suit against the Municipal Defendants. On November 28, 2001, White was granted leave to amend his complaint to add St. Joseph's University as a party. In Count I, White alleges a federal civil rights claim for false arrest under the First and Fourth Amendments against Sgt. Melso and Officers Cullen, Fredericksdorf, and Parker. In Count II, White brings a claim for failure to train against the City of Philadelphia under the First and Fourth Amendments. And in Count III, White brings a malicious prosecution claim against the Municipal Defendants. Both White and the Municipal Defendants now move for summary judgment on all counts.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file

showing a genuine issue of material fact for trial. See id. at 324, The substantive law determines which facts are material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the evidence is such that a reasonable jury could return a verdict for the nonmoving party, then there is a genuine issue of material fact. See id.

When deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir.1992), cert. denied,507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir.1992).

III. COUNT I: SERGEANT MELSO AND OFFICERS CULLEN, FREDERICKSDORF, AND PARKER

In order to maintain a civil rights cause of action under 42 U.S.C. § 1983, a plaintiff must prove that (1) he was deprived of rights, privileges or immunities secured by the Constitution or laws of the United States due to (2) the conduct of a person

acting under color of state law.[1] See West v. Atkins, 487 U.S. 42, 48, (1988). Section 1983 is not, by its own terms, a source of substantive rights. Instead, it provides a remedy for deprivations of rights that are established elsewhere in the Constitution or the federal statutes. See Baker v. McCollan, 443 U.S. 137, 144 n. 3, (1979); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir.1996).

A. Fourth Amendment Claims

White argues that he was falsely arrested because the Police Officers did not have sufficient probable cause to arrest him during each of the three incidents. The Officers counter that there was probable cause to arrest White.

Under the Fourth Amendment, a police officer cannot arrest a citizen without probable cause. See Paff v. Kaltenbach, 204 F.3d 425, 435 (3d Cir.2000). Probable cause exists when, at the time of the arrest, the facts and circumstances within the arresting

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[1] 42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

officer's knowledge are sufficient to warrant a reasonable person's belief that a suspect was committing an offense. See Johnson v. Campbell, 332 F.3d 199, 211 (3d Cir.2003); Orsatti v. New Jersey State Police, 71 F.3d 480, 483 (3d Cir.1995); United States v. Glasser, 750 F.2d 1197, 1205 (3d Cir.1984). "Probable cause to arrest requires more than mere suspicion; however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt." Orsatti, 71 F.3d at 482-83.

Probable cause is a factual analysis from which the officers on the scene must make an immediate determination. See Glasser, 750 F.2d at 1206. It is the function of the courts to determine whether the objective facts available to the officers, at the time of the arrest, were sufficient to justify a reasonable belief that an offense was being committed. See id. As a general matter, the question of probable cause in a § 1983 damage suit is one for the jury. See Montgomery v. DeSimone, 159 F.3d 120, 124 (3d Cir.1998). However, a district court may conclude "that probable cause exists as a matter of law if the evidence, viewed most favorably to [the non-moving party], reasonably would not support a contrary factual finding," and may enter summary judgment accordingly. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir.1997).

1. July 24, 1999 Incident

On July 24, 1999, White was arrested for disorderly conduct in the South Street area. The

Pennsylvania disorderly conduct statute, 18 Pa. Cons.Stat. Ann. § 5503(a), provides that:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior; (2) makes unreasonable noise; (3) uses obscene language, or makes an obscene gesture; or (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

Under the statute, "whether a defendant's words or acts rise to the level of disorderly conduct hinges upon whether they cause or unjustifiably risk a public disturbance." Commonwealth v. Hock, 556 Pa. 409, 728 A.2d 943, 946 (1999). "The cardinal feature of the crime of disorderly conduct is public unruliness which can or does lead to tumult and disorder." Id. (quoting Commonwealth v. Greene, 410 Pa. 111, 189 A.2d 141, 144 (1963)). However, it need not be shown that "any specific persons of the general public were actually disturbed."Russoli v. Salisbury Township, 126 F.Supp.2d 821, 845 (E.D.Pa.2000) (citing Basista v. Weir, 340 F.2d 74 (3d Cir.1965)).

Plaintiff contends that Police Officers Cullen and Parker had no probable cause to arrest him for disorderly conduct. Specifically, White contends that he preached for a short period of time, that about ten to twenty individuals gathered around him, and that only about five individuals engaged him in

conversation. Further, White contends that he did not sense that the crowd was becoming "hostile and erratic" in response to his statements about Tupac Shakur. Under these circumstances, White contends there was no probable cause to make out a violation for disorderly conduct.

Officers Cullen and Parker paint a very different picture of that evening. According to the Officers, White's "yelling" attracted a "loud and boisterous" crowd of about fifty to sixty individuals and blocked the sidewalk. Unlike the relatively calm conversation portrayed by White, the Officers both felt that the crowd was getting upset at White and that the situation could quickly degenerate into something even more chaotic. According to Officer Cullen, individuals were "yelling and screaming in his direction." Cullen Dep. at 23. Officer Parker testified that he asked White to move to another location "numerous times" but White refused each time. See Parker Dep. at 29. Under these circumstances, Officer Parker contends that there was sufficient probable cause to arrest White for disorderly conduct.

The scenarios portrayed by White and Officers Cullen and Parker demonstrate that there is a genuine issue of material fact preventing the Court from granting summary judgment to either party. Considering Defendants' motion for summary judgment and viewing the evidence in the light most favorable to Plaintiff White, the Court cannot conclude that a reasonable jury could only find that

the Officers had probable cause to arrest White. Similarly, if the evidence is viewed in the light most favorable to the Defendants, as required when considering Plaintiff's motion for summary judgment, the Court finds that a reasonable jury could conclude that there was sufficient probable cause to arrest White.

2. July 9, 2000 Incident

At the next year's Greek Picnic, White was arrested in front of McDonald's for violation of 18 Pa. Cons.Stat. Ann. § 5507(a). The statute defines obstructing highways and other public passages as follows:

> (a) Obstructing.-A person who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, ... sidewalk, ... [or] other public passage ... commits a summary offense, or in case he persists after warning by a law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such gathering.

18 Pa. Cons.Stat. Ann. § 5507(a).

Again, White and the Police Officers present widely diverging views of the events. Under Plaintiff's account, White stood on a chair and

preached for about two minutes in front of the McDonald's on Broad Street. During the two minutes, about ten individuals gathered around him and no one engaged him in conversation. White also maintains that there was plenty of room for pedestrian passage and therefore, he was not obstructing the sidewalk. Moreover, White denies that he told the crowd that "Tupac was dead in hell."

In contrast, Sgt. Melso described White as yelling into the crowd of about seventy individuals that had gathered around White. As Sgt. Melso approached White, White apparently started to yell that "Tupac ... was dead and burning in hell." At that point, the crowd started to get angry and yell back at White. Sgt. Melso was concerned that the crowd was "going to go after" White and that many individuals were forced to walk into the street to get around the situation. See Melso Dep., at 35, 37 (Docket No. 69, Ex. E). After White refused Sgt. Melso's repeated requests to move, Sgt. Melso arrested White.

Under these diverging accounts of the same incident, the Court finds that a disputed issue of material fact exists that prevents the Court from granting summary judgment to either party.

3. March 15, 2001 Incident

White's preaching at St. Joseph's University also raises genuine issues of material fact. On March 15, 2001, after preaching for about thirty minutes,

White was again arrested for obstructing highways and other public passageways in violation of 18 Pa. Cons.Stat. Ann. § 5507(a). The parties dispute the manner in which White was preaching, the size of the crowd that listened to White, the response from the crowd, the ability of pedestrians to pass by White, and the street traffic patterns occurring as a result of White's preaching.

Under these circumstances, the Court denies Plaintiff's motion for summary judgment as to violations of his Fourth Amendment rights and also denies Municipal Defendants' cross-motion for summary judgment as to violations of White's Fourth Amendment rights in their entirety.

B. First Amendment Claims

The First Amendment protects speech and other expressive activity in public places. See Diener v. Reed, 232 F.Supp.2d 362, 375 (M.D.Pa.2002) (citing Kreimer v. Bureau of Police, 958 F.2d 1242, 1255-56 (3d Cir.1992)), aff'd by No. 03-1405, 77 Fed.Appx. 601, 2003 WL 22326515 (3d Cir. Oct.10, 2003). For example, "[s]tanding on a sidewalk or in a public place reading from the bible and expressing dissatisfaction with the status quo are constitutionally protected exercises of free speech." Commonwealth v. Gowan, 582 A.2d 879, 881 (Pa. Super. Ct. 1990).

However, the freedom of speech "is not absolute at all times and under all circumstances."

See J.S. v. Bethlehem Area School District, 807 A.2d 847, 854 (2002) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942)); see also Johnson, 332 F.3d at 212. Speech that is likely to inflict unacceptable harm may be regulated. See J.S., 807 A.2d at 854. This narrow category of unprotected speech includes "fighting word," speech that incites others to imminent lawless action, obscenity, certain types of defamatory speech, and "true threats." See id.; Chaplinsky, 315 U.S. at 568 (fighting words); Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech that incites); Miller v. California, 413 U.S. 15 (1973) (obscenity); New York Times v. Sullivan, 376 U.S. 254 (1964) (defamatory speech); Watts v. United States 394 U.S. 705 (1969) ("true threats").

"Fighting words" are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace." Commonwealth v. Hock, 556 Pa. 409, 728 A.2d 943, 946 n. 3 (1999) (quoting Commonwealth v. Mastrangelo, 489 Pa. 254, 414 A.2d 54, 58 (1980)); see Chaplinsky, 315 U.S. at 572. The circumstances surrounding the words are crucial in determining whether words constitute "fighting words." See Hock, 728 A.2d at 946. The words must "do more than bother the listener; they must be nothing less than 'an invitation to exchange fisticuffs.' " Johnson, 332 F.3d at 212 (quoting Texas v. Johnson, 491 U.S. 397, 409 (1989)). Moreover, "profane" words alone, unaccompanied by any evidence of violent arousal, are not "fighting words" and are therefore protected speech. See Johnson, 332

F.3d at 212 (citing Cohen v. California, 403 U.S. 15, 20 (1971)); see also Brockway v. Shepherd, 942 F.Supp. 1012, 1017 (M.D.Pa.1996) ("[S]tanding alone, profane or vulgar language is not itself obscene and does not amount to fighting words.").

Thus, when analyzing First Amendment issues, a court needs to carefully "balance the fundamental right of free speech against the annoyance or inconvenience to other persons." Gowan, 582 A.2d at 881. Here, White contends that his preaching at the Greek Picnics and at St. Joseph's University is constitutionally protected speech and thus, his arrest violated his First Amendment rights. In White's view, he attended each of these events to spread the message of the gospel. In contrast, the Police Officers contend that White's speech went beyond "constitutionally protected boundaries to the realm of prohibitive and criminal behavior." Id. Specifically, the Police Officers contend that White was not arrested because of the content of his speech.

Even if White was arrested solely for the words he spoke, the facts do not conclusively demonstrate, one way or the other, that White's words were "fighting words" or words that "incite[d] others to imminent lawless action." See J.S., 807 A.2d at 854. White maintains that he, at no point, felt the crowds at the Greek Picnics were "hostile and erratic" or that the students at St. Joseph's University were offended by his words. White contends that individuals listened without hostility

and some even engaged him in conversation. On the other hand, the Police Officers felt that the crowds at the Greek Picnic and St. Joseph's University were getting riled up and shouted back in anger at White in response to his proclamations that "Tupac is dead and burning in hell" or that "Catholic girls were whores." The Police Officers at the Greek Picnics became concerned that the crowd was "going to go after" White. Further, while White contends that his preaching did block the sidewalk, the Police Officers vigorously disagree and contend that White's preaching caused dangerous conditions in congested areas. The Officers maintain that the safety hazard caused by White, and not the content of his speech, were the primary forces behind his arrests.

Because of the parties' widely contrasting descriptions of the same three incidents, the Court finds that there exists genuine issues of material fact and will not grant summary judgment to either party as to this claim. The Court thus denies Plaintiff's motion for summary judgment as to Count I in its entirety.

C. Qualified Immunity

The Police Officers also argue that even if White were to establish a violation of his Fourth or First Amendment rights, the doctrine of qualified immunity shields them from liability.

Under this doctrine, government officials "performing discretionary functions 'are shielded

from liability for civil damages insofar as their conduct does not violate clearly established statutory of constitutional rights of which a reasonable person would have known.' " Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir.1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). In evaluating a claim of qualified immunity, the court conducts a two-step inquiry. First, the court must first determine "whether the facts, taken in the light most favorable to the plaintiff, show a constitutional violation." Douris v. Dougherty, No. 01-5757, 2003 WL 231258, at *10 (E.D.Pa. Jan.31, 2003) (quoting Bennett v. Murphy, 274 F.3d 133, 136 (3d Cir.2002)). Second, if plaintiff's factual allegations establish a constitutional violation, the court must determine whether "a reasonable officer would have known that his actions were not pursuant to law." Douris, 2003 WL 231258, at *10 (citing Bennett, 274 F.3d at 136).

In the context of a claim based on probable cause, qualified immunity shields officers from suit for damages if a reasonable officer could have believed the arrest to be lawful, in light of clearly established law and the information the arresting officers possessed. See Hughes v. Shestakov, No. Civ. A. 00-6054, 2002 WL 1742666, at *2 (E.D.Pa. July 22, 2002) (quoting Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Thus, even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity. See id.

The Third Circuit has recognized that a "tension exists as to the proper role of the judge and jury where qualified immunity is asserted." Sherwood, 113 F.3d at 401. Such tension exists because while "the application of qualified immunity is a question of law," the existence of probable cause in a § 1983 action is a question of fact. Siegert v. Gilley, 500 U.S. 226, 232 (1991); see Sherwood, 113 F.3d at 401; Groman v. Township of Manalapan, 47 F.3d 628, 635 (3d Cir.1995). Further, "resort to a jury is appropriate in deciding the qualified immunity issue" if facts material to the reasonableness of the officer's beliefs and actions are in dispute. Sharrar, 128 F.3d at 828.

Factual issues exist making summary judgment inappropriate as to the Police Officers' determination of probable cause for White's arrest. These questions, requiring a trier of fact's attention, also prevent summary judgment entitling Officers Cullen, Parker, and Fredericksdorf and Sgt. Melso to qualified immunity. See Pahle v. Colebrookdale Township, 227 F.Supp.2d 361, 373 (E.D.Pa.2002) (stating that genuine issues of material fact existed to preclude granting of summary judgment based on qualified immunity); Russoli, 126 F.Supp.2d at 844. Accordingly, Defendant Police Officers' motion for summary judgment as to Count I is denied.

IV. COUNT II: CITY OF PHILADELPHIA

A municipality is liable for a constitutional tort only "when execution of a government's policy or

custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," inflicts a specific injury. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir.1997) (quoting Monell v. Dept. of Social Servs., 436 U.S. 658, 694 (1978)). A policy is made when "a 'decisionmaker possessing final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir.1996) (quoting Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir.1990) (citations omitted)). Under certain circumstances, a municipality is liable for failure to train subordinate officers when the "failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact." Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir.1999) (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989)). The policy must be the "moving force" behind the constitutional violation. See Wolf v. Sch. Dist. of Phila., No. 01-1183, 2002 WL 1471289, at *4 (E.D.Pa. June 19, 2002) (citing Canton, 489 U.S. at 388-89). Failure to adequately train municipal employees can ordinarily be considered deliberate indifference "only where the failure has caused a pattern of violations, and the need for more or different training is obvious and inadequacy is very likely to result in violation of constitutional rights." Cavicchia v. Phila. Housing Auth., No. 03-0116, 2003 WL 22595210, at *13 (E.D.Pa. Nov.7, 2003).

Moreover, a municipality may be "independently liable for a substantive due process violation even in situations where none of its employees are liable." Brown v. Commonw. of Pa. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 482 (3d Cir.2003) (citing Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir.1994)). However, for a municipality to be liable, "there still must be a violation of the plaintiff's constitutional rights." Id. (citing Collins v. City of Harker Heights, 503 U.S. 115, 122 (1992)). It is not enough that a municipality adopted with deliberate indifference a policy of inadequately training its officers. "There must be a 'direct causal link' between the policy and a constitutional violation." Id. (citing Canton, 489 U.S. at 385).

In Count II of his Amended Complaint, White alleges that the City of Philadelphia failed to adequately train its police officers regarding First Amendment rights. White argues that "the written materials are adequate except they make no mention of [the obstructing highways and passageways statute] 18 Pa. Cons.Stat. Ann. § 5507, of the requirements under the law to take action to control a crowd and order room for pedestrian passage prior to arrest for public speech resulting in crowd formation, and they make no mention of what specific actions a police officer must take when crowds form in response to speech." Pl.'s Mot. for Summ. J. and Response to Police Def.'s Mot. for Summ. J., at 42 (Docket No. 64). White focuses his attention specifically on 18 Pa. Cons.Stat. Ann. § 5507(b)(2)

which states:

> An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering.

18 Pa. Cons.Stat. Ann. § 5507(b)(2) (emphasis added). White interprets this provision as requiring police officers to uphold the right of the speaker in all instances.

In response, the City contends that it has provided more than adequate training of First Amendment rights to its police officers. The City provides two hours of First Amendment training to new recruits and updates existing officers about First Amendment issues through its yearly in-service training. All Philadelphia police officers receive a Basic Outline of First Amendment Outline. In a section entitled "Basic Law: Restriction of Free Speech," the Outline instructs, in pertinent part, that:

> 1. Freedom of speech is not absolute ....
> 2. Restrictions on Speech Within Public Forum Areas
>
> > A. Reasonable time, place and manner restrictions may be placed on expressive activity so long as the restrictions focus on the evils the government seeks to eliminate without at the same time

banning or significantly restricting a substantial quantity of speech that does not create the same evils.

(1) Police may have authority to minimize conditions which significantly impair public safety with respect to pedestrian or vehicular traffic.

(2) The First Amendment means that the government or police officers have no power to restrict expression because of its message, its ideas, subject matter or content.

B. Generally, police officers may not tell individuals in public forum areas that expressive activity is illegal, require people to move, or require that expression take place at another location, unless certain circumstances exist such as criminal activity, violence or disorderly conduct, or impairments of public safety.

(1) Depending on the overall circumstances of a situation, police may or may not have discretion to force an individual to move from the site of significant contact with the public, for example, a busy public sidewalk, to a place of less significant contact, for example, a sidewalk with less pedestrian traffic. The

> overall circumstances affect police discretion and all factors must be considered.

See Phila. Police Basic Outline of First Amendment Law (Docket No. 64, Ex. 13).

Additionally, all police officers receive a copy of Directive 94, which concerns the procedure for processions, parades, marches, or races, and its Appendix A, which specifically addresses "street speeches and meetings." Appendix A states, in part,

> I. [E]very citizen is free to make a speech on any lawful subject to a public gathering....
>
> A. Such speeches when made on sidewalks ... and other similar areas do not require a permit. Persons carrying banners are not required to move about, provided they are not impeding the movement of pedestrian or vehicular traffic....
>
> B. However, unusually large crowds may require the services and protection of police.... Passing pedestrians should have free access of the sidewalk and not have to walk around the crowd and into the street. It is the duty and responsibility of police personnel to protect the basic right of free speech and lawful assembly, to protect the rights and safety of the public and to prevent any acts of violence.

Phila. Police Dept. Directive 94, App. A (Docket No. 69, Ex. H).

The record thus provides ample evidence of the City's training of officers with respect to balancing the First Amendment right of freedom of speech against concerns of public safety. Although these teachings do not explicitly refer to 18 Pa. Cons.Stat. Ann. § 5507(2), they implicitly account for it by requiring all police officers to protect an individual's right to free speech unless the safety of the public is threatened. Police officers often face rapidly evolving situations which require them to use their judgment and discretion, coupled with their knowledge of First Amendment issues, in light of all of the information available to them at the time. This may lead officers to conclude that public safety is impaired, whether because pedestrians' access to sidewalks is obstructed or whether actual violence erupts or is about to erupt. As courts have previously recognized, the freedom of speech "is not absolute at all times and under all circumstances." See J.S., 569 Pa. at 650, 807 A.2d 847 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942)). Moreover, even if the Police Officers were mistaken in their judgment, the United States Supreme Court has said that "adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable." City of Canton, 489 U.S. at 390-91.

The record is also devoid of any evidence

showing that the City adopted with "deliberate indifference" a policy of inadequately training its officers on First Amendment issues. Rather, the record shows that the City implemented its First Amendment Lesson Plan as a part of the settlement to Lickteig v. Landauer, a case that also involved individuals preaching the message of the gospel who believed their right to express their religious beliefs were unconstitutionally restricted. The record also shows that the City provides First Amendment training above and beyond what the Commonwealth of Pennsylvania requires. White also fails to provide support that the need for training was "so obvious due to the likely violation of constitutional rights." Cavicchia, 2003 WL 22595210, at *13. Thus, the Court finds that Plaintiff has failed to establish independent municipal liability against the City of Philadelphia. Accordingly, summary judgment is granted in favor of the City as to this Count.

V. COUNT III: MALICIOUS PROSECUTION

Plaintiff's final claim is that of malicious prosecution against all the Municipal Defendants. As neither Plaintiff nor Municipal Defendants addressed this claim in their briefs, the Court declines to address the issue at this juncture.

VI. CONCLUSION

For the reasons stated above, the Court denies both Plaintiff's Motion and Municipal Defendants' Cross-Motion for summary judgment as to Count I

and Count III. The Court grants summary judgment in favor of the City of Philadelphia as to Count II. An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORY OUTREACH, et al.	:	CIVIL ACTION
	:	
vi.	:	
	:	
SERGEANT MELSO, et al.	:	NO. 00-5185

ORDER

AND NOW, this 22nd day of March, 2004, upon consideration of Plaintiffs' Motion for Summary Judgment (Docket No. 64), Municipal Defendants' Opposition to Plaintiffs' Motion for Summary Judgment and Municipal Defendants' Cross-Motion for Summary Judgment (Docket No. 68), and Plaintiffs' revised reply thereto (Docket No. 73), IT IS HEREBY ORDERED that:

(1) Summary judgment is **DENIED** to both Plaintiffs and Municipal Defendants as to Counts I and III; **and**
(2) Summary judgment is **GRANTED** in favor of the city of Philadelphia as to Count II.

BY THE COURT:

S/_____
HERBERT J. HUTTON, S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORY OUTREACH, et al.	:	CIVIL ACTION
	:	
vii.	:	
	:	
SERGEANT MELSO, et al.	:	NO. 00-5185

MEMORANDUM AND ORDER

HUTTON, S.J. November 29, 2004

Presently before the Court are Defendant St. Joseph's University's Motion for Summary Judgment and Supplement thereto (Docket Nos. 99 and 114), Plaintiffs' response thereto (Docket No. 123), Plaintiffs' Motion for Summary Judgment against St. Joseph's University and Supplement thereto (Docket Nos. 118 and 122), and Defendant's response thereto (Docket No. 125).

I. BACKGROUND

Plaintiffs C. Stephen White ("White") and Victory Outreach Center[1] sued Defendants Police Officers and the City of Philadelphia ("City" or "Philadelphia") (collectively "the Municipal Defendants") on October 12, 2000. Plaintiffs amended

[1] The name "Victory Outreach" was changed to the "Philadelphia Gospel Outreach Center." The entity is an inner-city mission and White is currently its sole employee.

their Complaint and added St. Joseph's University ("SJU") on November 28, 2001. The Amended Complaint alleges infringement of White's First and Fourth Amendment rights pursuant to 42 U.S.C. § 1983.

This suit revolves around four incidents, two of which occurred during the Greek Picnics on July 24, 1999 and July 9, 2000[2], and the third and fourth at SJU on March 14 and 15, 2001. The motions presently before the Court relate to the events that took place in March of 2001 at SJU.

A. March 14, 2001

Plaintiff White is a minister and evangelist who believes that it is his mission to bring his message of the gospel to college students on campuses in the Philadelphia area. White has preached at local college campuses such as the University of Pennsylvania, Temple University, and Drexel University. On March 14, 2001, White preached at SJU, a Catholic school, for the first time. White stood on the "main concourse" along City Line Avenue and addressed the students while his friend, Timothy Gruver ("Gruver"), distributed religious material. On that day, White claims that approximately forty students and other individuals gathered around him. While White was preaching, Father Rick Malloy, a professor at SJU, approached

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[2] For a detailed description of the events that took place at the Greek picnics, see this Court's order dated March 18, 2004.

White and began speaking with him about theology and their differing viewpoints. See Rick Malloy Dep. at 6, 11, 16-17 (Docket No. 120, Ex. 26); see also C. Stephen White Dep., June 27, *644 2003, at 34-36 (Docket No. 120, Ex. 36) [hereinafter "White II"]. This conversation was brief and ended with Father Malloy taking White's business card and departing. White claims that at some point after this, a member of SJU security approached and verbally assaulted him. See White Dep., May 19, 2001, at 79 (Docket No. 99, Ex. A) [hereinafter White I]; White II at 53-64. According to White, this individual used profanity and told White that he would beat him if the police did not come. White II at 53-54; see also White I at 79.[3] James LeVere, a security officer for SJU, admits that he approached White and told him to move because he was on private property. See James LeVere Dep. at 12 (Docket No. 120, Ex. 21). LeVere claims that White moved from the grass to the sidewalk while LeVere stood close by, observed White, and called SJU security headquarters to report that White had moved. See LeVere Dep. at 13-14.

At some point after LeVere and White's interaction, the police were called and Officer Dexter Charles Perry ("Officer Perry") and James Keith ("Officer Keith") arrived at SJU. See White II at 72; see also Dexter Charles Perry Dep. at 7-10 (Docket No. 120, Ex. 31); James Keith Dep. at 4, 9 (Docket

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[3] According to Gruver, this exchange took place on March 15, 2001. See Timothy Gruver Dep. at 56 (Docket No. 120, Ex. 32).

No. 120, Ex. 34). According to White, the SJU security guard who threatened him spoke with the police officers when they first arrived on the scene. See White II at 69-71. Gruver also describes seeing the police officers speak with an SJU security guard. See Gruver Dep. at 50 (Docket No. 120, Ex. 32). Both police officers deny speaking to any member of SJU security on March 14, 2001. See Perry Dep. at 19, Keith Dep. at 15-16. The police officers and White engaged in a brief conversation. After this conversation, and because it was getting late in the day, White agreed to leave. See White II at 75.

B. March 15, 2001

White returned to the main concourse of St. Joseph's University the next day, on March 15, 2001. In his first deposition, White states that about ten students assembled around him. See White I at 82-84. In his second deposition, White states that no one gathered around him and that approximately four to five students listened to him from a distance. See White II, at 82. White also states that he saw no SJU security guards on March 15. See White II at 81-82.

Approximately half an hour later, Philadelphia Police Officer Eric Fredericksdorf approached White and asked White to move to another location by a parking lot. See White II, at 83. According to White, Officer Fredreriksdorf stated that there were complaints that White was offending students and asked White to move to a different location or be arrested. See White II at 85-88. In response, White

stated that he prayed and believed that he needed to continue preaching at the same location. See White II, at 88. At that point, White was placed under arrest for obstructing the highway and public passageways in violation of Pa. Cons.Stat. Ann. § 5507.[4]

White's Amended Complaint contains three counts. In Count I, White alleges a federal civil rights claim under the First and Fourth Amendments against the Philadelphia Police Officers and SJU. Counts II and III are against the City of Philadelphia and the Municipal Defendants only. On March 18, 2004, this Court issued an Order denying Plaintiffs' and Municipal Defendants' motions for summary judgment as to Counts I and III. The Court granted Defendant City's motion for summary judgment as to Count II. Presently before the Court are Plaintiffs'

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[4] The statute defines obstructing highways and other public passages as follows:

> (a) Obstructing.-A person who, having no legal privilege to do so, intentionally or recklessly obstructs any highway, ... sidewalk, ... [or] other public passage ... commits a summary offense, or in case he persists after warning by a law officer, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this subsection solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such gathering.

18 Pa. Cons.Stat. Ann. § 5507(a).

and Defendant SJU's motions for summary judgment as to Count I.[5]

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file showing a genuine issue of material fact for trial. See id. at 324. The substantive law determines which facts are material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the evidence is such that a reasonable jury could return a verdict for the non-moving party, then there is a genuine issue of material fact. See id.

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[5] SJU alludes to Counts V and X in its motion for summary judgment, but as the Amended Complaint contains only three counts, and only the first of these three counts mentions SJU, the Court will restrict its ruling to Count I of the Amended Complaint.

When deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the non-moving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir.1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir.1992).

III. DISCUSSION

In order to maintain a civil rights cause of action under 42 U.S.C. § 1983, a plaintiff must prove that (1) a person acting under color of state law, (2) deprived him of rights, privileges or immunities secured by the Constitution or laws of the United States.[6] See West v. Atkins, 487 U.S. 42, 48, (1988).

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[6] 42 U.S.C. § 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 is not, by its own terms, a source of substantive rights. Instead, it provides a remedy for deprivations of rights that are established elsewhere in the Constitution or the federal statutes. See Baker v. McCollan, 443 U.S. 137, 144 n. 3, (1979); Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir.1996).

The first requirement in establishing a § 1983 violation is to show that the defendant was acting under color of state law. To establish that a private actor is acting under color of state law, Plaintiffs must show that there is such a " 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' " Adams v. Teamsters Local 115, 2003 WL 22005708, *5 (E.D.Pa. Aug.6, 2003) (quoting Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, (2001)). Plaintiff alleges this nexus exists because SJU and its security guards conspired with the Philadelphia police officers to deprive White of his First and Fourth Amendment rights. Before addressing the existence of the conspiracy, the Court must determine if Plaintiff has met the standard for corporate liability against SJU.

The Supreme Court held that a municipality cannot be held liable under a theory of respondeat superior. See Monell v. New York City Dept. of Sec. Serv., 436 U.S. 658, 694, (1978). Although neither the Supreme Court nor the Third Circuit has addressed the issue of whether a private corporation can be held liable for the acts of its employees on a respondeat superior theory, this Court and several others have

addressed the issue. In Miller v. City of Philadelphia, 1996 WL 683827 (E.D.Pa.1996), this Court stated that the rule from Monell "equally applies to private corporations." Id. at *3.See also Miller v. Hoffman, 1998 WL 404034, *5 (E.D.Pa.1998) (finding that a private corporation can not be held vicariously liable for the acts of its staff under § 1983). Therefore, Plaintiffs cannot succeed on a claim against SJU predicated on respondeat superior liability.

However, the Supreme Court also stated an exception to the rule prohibiting respondeat superior liability. In Monell, the Supreme Court stated that "when execution of a government's policy or custom ... inflicts the injury ... the government as an entity is responsible under § 1983." Monell, 436 U.S. at 694, 98 S.Ct. 2018. This Court has also extended this exception to private corporations. See Hoffman, 1998 WL 404034 at *5. In order for a private corporation to be liable, it must have known of and "acquiesced in the deprivation of plaintiffs' rights." Id. To meet this burden, Plaintiffs must show that the corporation "established and maintained a policy, practice or custom which directly caused plaintiffs' constitutional harm" with "deliberate indifference to the consequences." Id.

Here, Plaintiffs have presented evidence of SJU's policies regarding speech on campus and availability of campus facilities for use by outside speakers. Plaintiffs have also presented evidence from the SJU Department of Safety and Security Director's Log that a security officer was dispatched

to the scene and instructed to bring the literature back to the office. Plaintiffs allege this event occurred before SJU ever called the police and before SJU determined exactly where White was located. Viewed in the light most favorable to them, Plaintiffs have presented an issue as to whether SJU had a custom of allowing its security guards to violate White's First and Fourth Amendment rights.

Plaintiffs have also met their burden of demonstrating a genuine issue of material fact as to whether or not SJU and its security guards conspired with the Philadelphia police officers. To succeed on this claim at the summary judgment stage, Plaintiffs must satisfy the elements of a civil conspiracy. To demonstrate a civil conspiracy under § 1983, a plaintiff must establish (1) the existence of a conspiracy and (2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, (1970). A civil conspiracy is a "combination of two or more persons acting in concert to commit an unlawful act, or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties 'to inflict a wrong against or injury upon another,' and 'an overt act that results in damage.' " Adams, 2003 WL 22005708 at *6 (quoting Hampton v. Hanrahan, 600 F.2d 600, 620-21 (7th Cir.1979), rev'd in part on other grounds,446 U.S. 754, (1980)). Such an agreement can be proven through either direct or circumstantial evidence. See id. The question of whether an agreement exists is for the jury to decide "so long as

there is a possibility that the jury can infer from the circumstances that [the alleged conspirators] had a meeting of the minds and thus reached an understanding to achieve the conspiracy's objectives." Hampton, 600 F.2d at 621 (citing Adickes, 398 U.S. at 158-59). Thus, when a plaintiff alleges a conspiracy to violate civil rights, "the existence or nonexistence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." Adickes, 398 U.S. at 176.

Viewed in a light most favorable to Plaintiffs, the Court finds that there is sufficient evidence from which a jury could determine that a conspiracy existed. Plaintiffs argue that the security guards spoke with the police officers who arrived at the scene on the first day for a few moments before they spoke with White. Plaintiffs have also provided circumstantial evidence in the form of the security log and the police report from the second day that establish a genuine issue as to the existence of a conspiracy. Because Plaintiffs have raised a genuine issue of material fact as to whether a conspiracy existed, the Court must deny Defendant SJU's motion for summary judgment.

Since this is a cross motion for summary judgment, the Court will also view the evidence in the light most favorable to SJU in ruling on Plaintiffs' motion for summary judgment. SJU provides evidence that the police officers never spoke with any SJU security guards. Viewing this evidence in the light most favorable to SJU, there is an issue

as to whether the conspiracy existed and the Court must also deny Plaintiffs' motion for summary judgment.

IV. CONCLUSION

For the reasons stated above, the Court denies Defendant SJU's Motion for Summary Judgment as to Count I and denies Plaintiffs' Cross-Motion for Summary Judgment as to Count I.
An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORY OUTREACH, et al.	:	CIVIL ACTION
	:	
viii.	:	
	:	
SERGEANT MELSO, et al.	:	NO. 00-5185

ORDER

AND NOW, this 29th day of November, 2004, upon consideration of Defendant St. Joseph's University's Motion for Summary Judgment and Supplement thereto (Docket Nos. 99 and 114), Plaintiffs' response thereto (Docket No. 123), Plaintiffs' Motion for Summary Judgment against St. Joseph's University and Supplement thereto (Docket Nos. 118 and 122), and Defendant's response thereto (Docket No. 125), IT IS HEREBY ORDERED that:

(1) Summary judgment is **DENIED** to Defendant SJU as to Count I and

(2) Summary judgment is **DENIED** to Plaintiff as to Count I.

BY THE COURT:

S/_____
HERBERT J. HUTTON, S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VICTORY OUTREACH, ET AL.	:	
Plaintiffs	:	
	:	CIVIL ACTION
vs.	:	NO. 00-5185
	:	
SERGEANT MELSO, ET AL.	:	
Defendants.	:	

ORDER

AND NOW on this _____ day of February, 2007, upon consideration of Plaintiff's Motion for a new Trial (Doc. 199), Defendant St. Joseph's University's Response (Doc. 200), Defendant Melso, et al.'s Response (Doc. 202), Defendant St. Joseph's University's Motion to Strike Plaintiff's Post Trial Motion for Lack of Compliance with Local Rule 7.1(e), Plaintiff's Response to Defendant's Motion to Strike (Doc. 205), and Plaintiff's Motion to Extend Time to Order Trial Transcript (Doc. 204). **IT IS HEREBY ORDERED and DECREED** that:

1) Defendant's Motion to Strike Plaintiff's Post-trial Motion (Doc. 205) is **GRANTED**;[1] and

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[1] The jury trial concluded on November 16, 2006 with the jury finding in favor of the defendants. On December 7, 2006, Plaintiff filed a Motion for a New Trial, but did not comply with Local Rule 7.1(e) because Plaintiff did not order a transcript or file a verified Motion showing good cause to be excused from Local Rule 7.1(e)

2) Plaintiff's Motion to Extend Time (Doc. 204) is **DENIED**.

BY THE COURT:

/S/ PETRESE B. TUCKER

Hon. Petrese B. Tucker, U.S.D.J.

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within 14 days of filing the Motion for a New Trial. On January 2, 2007, Defendant St. Joseph's University filed a Motion to Strike Plaintiff's Post Trial Motion for Lack of Compliance with Local Rule 7.1(e). On January 3, 2007, Plaintiff filed a Motion to Extend Time to Order a Trial Transcript or to be Excused form the Requirement to Order. On January 4, 2007, Plaintiff filed a Response to the Motion to Strike indicating that Plaintiff's counsel's father has been ill since December 2007 and that Plaintiff is incarcerated and unable to pay the transcript fee. Pursuant to Local Rule 7.1(e), this Court has discretion to dismiss Plaintiff's Motion. It does not comport that counsel was able to file the Motion for a New Trial on December 7, 2006, but was unable to file a much less complicated 7.1(e) motion at the same time. Further, it is not clear that Plaintiff will be able to order the transcript at any point.

Additionally, the Plaintiff has made allegations in his motion for a new trial that cannot be decided without the benefit of a transcript, namely decision to exclude evident regarding "The Death Cookie," the testimony of Carla Tamagni, testimony regarding the policies of St. Joseph's University or the practices of its security guards, the leading nature of any questions and the Court's refusal to permit certain questions. Further, in making these arguments, Plaintiff is relying on his own recollection of the testimony and decisions made at trial, and in general such recollections are inherently unreliable.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

VICTORY OUTREACH CENTER and
C. STEPHEN WHITE,
Plaintiffs

vs. 00-CV-5185

SERGEANT MELSO, et al.,
Defendants

Day 4 of Trial
November 16, 2006
Courtroom 9-B
Philadelphia, PA

Before THE HONORABLE PETRESE B. TUCKER,
J. and a JURY

APPEARANCES:

J. Michael Considine, Jr., Esq. For the Plaintiffs
12 E. Barnard Street
Suite 100
West Chester, PA 19382

Nancy O'Neill, OCR
1234 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

THE COURT: Okay. You may be seated.

Members of the jury, now that you have heard all the evidence to be presented in this case, you will soon leave the courtroom and begin discussing this case in the jury room. Before you do so, I want to remind you of your duties as jurors and to discuss with you the law applicable in the case.

As jurors, your job is threefold. First, you must find the facts from all the evidence admitted during the trial. Second, you must apply the law as I instruct you on those facts. And, third, you must make a decision based upon the facts as you find them and the applicable law. You must do this without considering your own personal feelings or biases.

I will first give you a general overview of what you should consider in your deliberations and will explain to you certain principles which should guide you in evaluating the evidence; then I will discuss with you legal principles which you must consider in determining liability; and finally, I will discuss the law you will apply when determining damages in you decide there is liability.

My job is to decide what rules of law apply to the case. During the course of the trial, I explained some of those rules to you. I will further explain the rules of law to you before you go to the jury room. This is my job. This is not the job of the lawyers.

You must follow all the rules as I have explained them. You may not follow some and ignore others. Even if you disagree or don't understand the reasons for some of the rules, you are bound to follow them.

I will first discuss your responsibility to weigh the evidence that was presented to you during the trial. The evidence from which you are to decide what the facts are consist of sworn testimony of the witnesses, both on direct and cross-examination, regardless of who called the witnesses, and regardless of whether that testimony was given by video deposition or live – or by deposition or live.

Also, it includes the exhibits which have been received into evidence and any facts to which all the lawyers have agreed or stipulated.

As jurors, your role is to resolve and decide the factual issues in the case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such reasonable inferences as may be warranted by the testimony and the exhibits in this case.

As jurors, it is your duty to consider all of the evidence in the case, find from the facts which you consider to be the believable evidence, apply the law that I will give you in these instructions to that

believable evidence, and reach a verdict regardless of the consequences.

You are, of course, required to perform your duty as jurors without letting bias, prejudice or sympathy play a part in your deliberations. The law does not permit jurors to be governed by bias, prejudice or sympathy. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict regardless of the consequences.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the plaintiff or the defendant, may have said with respect to matters in evidence or to any factual matter, whether stated in a question, in argument or in summation is not to be substituted for your own independent recollection.

So, too, anything that I may have said during the trial or may refer to during the course of these instructions as to any matter in evidence is not to be substituted for your own recollection.

The burden is on the plaintiff in a civil case such as this to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in this case, you, the jury, should find for the defendant as to that claim.

To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of evidence in the case means such evidence when considered and compared with that opposed to it has more convincing force and produces in your minds belief that what is a sought to be proved is more likely true than not true.

This rule does not, of course, require proof to an absolute certainty since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence, you may, unless instructed otherwise, consider the testimony of all witnesses, regardless of who may have called them, and the exhibits received in evidence, regardless of who may have produced them.

In other words, a preponderance of the evidence is established as to a fact if you are persuaded that it is more probably true than not true. To put it another way, think if you will of an ordinary balance scale with a pan on each side. On the one side you the scale you place all the believable evidence favorable to the plaintiff, on the other side you place all the believable evidence favorable to the defendant. Because the plaintiff has the burden of proof, he may recover against the defendant only if the scale tips in his favor. If you find that the scale is equally balanced or that it favors a defendant, you must return a verdict in favor of the defendant.

Now, as I have told you, the evidence in this case consists of the sworn testimony of the witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them. Anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Statements and arguments of counsel are not evidence in the case, unless the statement is made as an admission or as a stipulation of fact. When the attorneys on both sides stipulate or agree that if a witness were called he or she would provide certain testimony, then you should treat that stipulation as evidence.

Any evidence as to which an objection was sustained by the court and any evidence ordered stricken by the court must be entirely disregarded.

Questions without answers are not evidence. The evidence consists of the question and the answers taken together.

You are to consider only the evidence in the case; but in your consideration of that evidence, you are not limited to the bald statements of the witnesses. You are permitted to draw such reasonable inferences from the testimony and other evidence as you believe are justified in light of common experience. In other words, you may make deductions and reach conclusions that reason and

common sense lead you to draw from the facts which have been established by the evidence.

Now, there are two types of evidence which are generally presented during a trial. There is direct evidence and there is circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eye witness. Circumstantial evidence is proof of a chain of facts and circumstances indicating existence of a fact. I gave you previously the example of the person coming in with the raincoat. That would be circumstantial evidence. And if they took the witness stand and told you what was going on outside, that would be eye witness testimony, which is an example of direct evidence.

As a general rule, the law makes no distinction direct and circumstantial evidence, but simply requires that before finding liability against any defendant, you, the jury, must be satisfied of defendant's liability by a preponderance of the evidence, direct or circumstantial.

During the course of this trial, you heard read deposition testimony. Deposition testimony is a witness is sworn, recorded answers to questions asked of him in advance of trial by one or more of the attorneys. Such testimony is entitled to the same consideration and is to judged as to credibility and weight in the same way as if the witness had been present and had testified from the witness stand.

It is often difficult to determine the motivation of which underlies a person's actions. Because of this, your analysis must concentrate not on individual incidents, but on the overall scenario. Just as a play cannot be understood on the basis of some of the scenes, but only on its entire performance, you must consider the meaning that emerges from the evidence as a whole as you do your work.

As jurors, you are the sole judges of the credibility and the believability of the witnesses and the weight their testimony deserves. You may be guided by the appearance and the conduct of the witnesses or by the manner in which the witness testified or by the character of the testimony given, or by the evidence contrary to the testimony given by the witness.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief.

Consider each witness's intelligence, motive and state of mind, demeanor or manner while giving testimony. Consider the witness's ability to observe the matters to which he has testified and whether he impresses you as having an accurate recollection of those matters.

Consider also any relation each witness may bear to either side of the case, the manner in which

each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it happen differently. An innocent misrecollection, like failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from an innocent error or an intentional falsehood.

After making your own judgment, you should give the testimony of each witness such weight, if any, you may think it deserves. In short, you may accept or reject the testimony of any witnesses in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence of nonexistence of any fact. You may find the testimony of a single witness or a small number of witnesses as to any fact more credible than the testimony of a larger number of witnesses to the contrary.

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection which the witness may have toward one of the parties. Likewise, you may consider evidence of any other interests of motive the witness may have. You may consider whether a witness has permitted any such bias or interest to color his testimony. In short, if you find that a witness is biased, you should view his testimony with caution, weigh it with care and subject it to close and searching scrutiny.

Now, you may have heard evidence that a witness made a statement on an earlier occasion which counsel argues is inconsistent with the witness's trial testimony. It is for you to determine whether any statement was inconsistent. If you find that the witness made an earlier statement that conflicts with the trial testimony, you may consider that fact in determining how much of the trial testimony, if any, to believe. In making this determination you may consider whether the witness purposely made a false statement or whether it was an innocent mistake, whether the inconsistency concerns an important fact or whether it had to do with a small detail, and whether the witness had an explanation for the inconsistency and whether that explanation appealed to your common sense.

It is exclusively your duty based upon all the evidence and your won good judgment to determine whether the prior statement was inconsistent and, if so, how much, is any, weight is to be given to the

inconsistent statement in determining whether to believe all or part of the witness' testimony.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you ma think it deserves.

If you conclude that one of the witnesses testified falsely and intentionally about any fact which is necessary to your decision in this case, then for that reason alone you may, if you wish, disregard everything that the witness has said. However, you are not required to disregard everything the witness said for this reason: It is entirely possible that the witness testified falsely and intentionally in one respect but truthfully about everything else. If that is the situation, you may accept that part of the witness' testimony which is truthful and which you believe and you may reject that part which is false and not worthy of belief.

You're not required to accept testimony even though the testimony was uncontradicted and the witness was not impeached. You may decide because of the witness' bearing and demeanor or because of the inherent improbability of the testimony of for reasons sufficient to you that such testimony is not worthy of belief.

You must decide this case on the facts only. You are not permitted to reach your verdict merely on the basis of speculation or conjecture. There must be evidence upon which your conclusions are logically based.

Sympathy for or prejudice against either party must play no part in your deliberations. Your verdict must not be based upon sympathy that you feel for either party.

Now, in this case many of the witnesses have been law enforcement officers. The testimony of a police officer is entitled to no special or exclusive sanctity. An officer who takes the witness stand subjects his testimony to the same examination and the same test that any other witness does, and in this case the police officers should not be believed nor disbelieved merely because they are police officers. You should recall their demeanor on the witness stand, their manner in testifying, the substance of their testimony, and weigh and balance it just as carefully as you would the testimony of any other witness. People employed as police officers do not stand in any higher station in the community than other persons, and their testimony is not entitled to any greater weight.

Now I'm going to proceed to the nature of the claims by the plaintiff against the defendant. When we started out, we had more defendants. The Saint Joseph's University was a defendant in this case. Saint Joseph's University is no longer a defendant in

this case for our purposes at this time, so you needn't consider Saint Joseph's University.

The plaintiff is this case is C. Stephen White. The plaintiff claims damages alleged to have been sustained by him as a result of a deprivation under color of state law of rights secured to you by the United States Constitution and by a federal statute protecting the civil rights of all persons within the United States.

The suit involves four incidents during which Plaintiff White alleges that his First and Fourth Amendment rights were violated. The first two incidents occurred during the Greek Picnics on July 24th, 1999 and July 9th, 2000. The first incident took place on South and 2nd Streets, and the second incident took place at Broad and Diamond Streets in Philadelphia. The third incident occurred at Saint Joseph's University on March 14th, 2001. The fourth incident occurred on March 15th, 2001, also at St. Joseph's University.

Sergeant Melso and Police Officers Jay Parker, James Cullen and Eric Fredericksdorf deny that any of their actions during the time in question violated Mr. White's constitutional rights or were contrary to state law.

As is obvious, there is more than one defendant in this case and as well as more than one incident. It does not follow from the fact alone that if one defendant is found liable to the plaintiff, all

defendants are liable. Each defendant is entitled to fair consideration of the evidence relating to that particular incident.

Now, as I mentioned, this is a federal civil rights law involved in this case. The federal claims against defendants are based on the civil rights law, 42 U.S.C. 1983. This law provides a remedy for individuals who have been deprived of their constitutional rights under color of state law.

The United States Code states every person who under color of any statute, ordinance, regulation, custom of usage of any state or territory or the District of Columbia subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To establish a claim under Section 1983 against any of the defendants, the plaintiff must establish by a preponderance of the evidence each of the following three elements: First, that the defendants acted under color of the authority of the Commonwealth of Pennsylvania; 2nd Street, that the defendants intentionally deprived the plaintiff of a constitutional right; and third, that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff.

I will now examine each of these three elements in greater detail.

In order for unlawful acts of an official to be done under the color of any law, the unlawful acts must be done while the official is purporting or pretending to act in the performance of the officials duties. The parties here have stipulated that the defendants were acting under color of law at all times relevant to this lawsuit.

To establish the 2nd Street element of the Section 1983 claim, plaintiff must show by a preponderance of the evidence that he was deprived of federal rights by the defendants. In this case, the plaintiff claims he was deprived of – and I'll discuss first his First Amendment rights to free speech and free exercise of religion.

To establish a claim under section 1983, the plaintiff must prove also by a preponderance of the evidence that the defendant acted intentionally. An act is intentional if it is done knowingly, that is if it done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. However, the act of a defendant may be considered intentional if the act or failure to act is knowingly done or omitted, notwithstanding the fact that the defendant did not intend to violate the Constitution.

The third element which plaintiff must prove is that the defendant's act was the proximate cause of

any injuries sustained by the plaintiff. Proximate cause means that there must be a sufficient causal connection between the act of a defendant and any injury or damage sustained by the plaintiff. An act is a proximate act if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was reasonable – was a reasonably foreseeable consequence of the defendant's act. If an injury was a direct result or reasonably probable consequence of a defendant's act, it was proximately caused by such act. In other words, if a defendant's act had such an effect in producing the injury that reasonable persons would regard it as being the cause of the injury, then the act is the proximate cause.

Plaintiff brings constitutional claims against Defendants Melso, Parker, Cullen, and Fredericksdorf. He claims that his rights protected by the First Amendment were violated by the defendants on the dates at issue in the lawsuit. I will now explain to you the law that you must apply in deciding whether plaintiff's Constitutional rights were or were not violated and whether or not judgment should be entered in favor of the plaintiff or the defendants.

The First Amendment protects speech and other expressive activity in public places. All of the activities at issue in this case have taken place in the public forum. However, protection afforded by the First Amendment is not absolute. Principles of religious tolerance do not relieve any individual from

complying with the laws of general applicability, so that the right of free exercise does not relieve an individual of the right to comply with valid and neutral law of general applicability.

Even though the First Amendment rights are to be guarded, they may still be regulated by the state. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

The law thus allows for reasonable regulation of First Amendment rights by governmental authority that preserves peace, order and tranquility. The government has a strong stake in preserving the peace, protecting its citizens and maintaining public safety.

Now, the plaintiff claims that the restrictions on his activity were content based. Discrimination against speech because of its message may be deemed to be unconstitutional. A restriction on speech is content-based when it is based on the message of the speaker or the dislikes of the audience. For the state to enforce a content-based exclusion, it must show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

So, if you find that the restriction was content-based, then you will perform the following analysis: If you find by a preponderance of the evidence that

any of the defendants, 1, acted to restrict Mr. White's free speech activities because of the content of his message or his viewpoint, and 2, that they did not have a compelling reason for doing so, and 3, the restriction was not narrowly drawn to achieve that end, then you must find the defendants liable to plaintiff for violating his constitutionally-protected rights.

The defendants in this case claim that any restrictions on plaintiff's activity were restricted as to time, place and manner of that activity. I instruct you that the government may impose reasonable time, place and manner restrictions on First Amendment activity to further significant governmental interests.

If you find the restrictions were time, place and manner restrictions, then you perform the following analysis: Number1, if you find that the defendants actions were restrictions on time, place and manner of the plaintiff's activity, and, #2, that the restrictions were designed to further a significant governmental interest, and 3, that the restrictions were reasonable, then you must find for the defendants and against the plaintiff.

For purposes of 1983, a claim for the – for the purposes of a 1983 claim based on the chilling of First Amendment rights, it must be shown that the police officers' actions were sufficiently intimidating to chill the speech of a person of ordinary firmness.

Plaintiff also claims that he was unreasonably seized in violation of his Fourth Amendment rights. The Fourth Amendment to the United States Constitution protects persons from being subjected to unreasonable seizures by the police. A law enforcement official may only seize a person, for example, by stopping or arresting the person if there is an appropriate justification to do so. In this case, plaintiff claims that the defendants subjected him to an unreasonable arrest in violation of the Fourth Amendment. To establish this claim plaintiff must prove each of the following three things by a preponderance of the evidence: First, that the defendant intentionally arrested the plaintiff; second, that the arrest subjected the plaintiff to a seizure; and third, that the seizure was unreasonable.

I will now give you details on what constitutes a seizure and how to decide whether the seizure is reasonable or unreasonable.

An arrest is a seizure, and the Fourth Amendment prohibits police officers from arresting a person unless there is probable cause to do so. In this case, the defendants arrested the plaintiff. You must decide whether plaintiff has proved by a preponderance of the evidence that the defendant lacked probable cause to arrest the plaintiff. The inquiry here is not whether or not the plaintiff is guilty of what he was arrested for; the inquiry here is whether the plaintiff has proven by a preponderance of the evidence that the defendant lacked probable cause.

So, again, the inquiry is not guilt or innocence of obstructing the highway. The issue is whether or not the defendants had probable cause to arrest the plaintiff.

To determine whether or not probable cause existed, you should consider whether the facts and circumstances available to the defendant would warrant a prudent officer in believing that plaintiff had committed or was committing a crime. The decision whether to prosecute is within the prosecutor's discretion, and he or she may choose not to prosecute a charge for any reason. Thus the decision not to prosecute plaintiff does not establish that the defendant lacked probable cause to arrest the plaintiff. You must determine whether the defendant had had probable cause based upon the facts as he and circumstances known to the defendant at the time of the arrest, not what happened afterwards.

Probable cause requires more than mere suspicion; however, it does not require that the officers have evidence sufficient to prove guilt beyond a reasonable doubt. The standard of probable cause represents a balance between the individual's right to liberty and the government's duty to control crime. Because police officers often confront ambiguous situations, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable officers.

As I told you earlier, plaintiff must prove that the defendants intended to commit the acts in question. But apart from that requirement, the defendant's actual motivation is irrelevant. If defendant's actions constitute an unreasonable seizure, it does not matter whether the defendants had good motivations. And an officer's improper motive is irrelevant to the question whether the objective facts available to the officer at the time give rise to probable cause.

Now, you heard plaintiff's counsel make reference to certain statutes. Under the Pennsylvania law, Section 5503, a person is guilty of disorderly conduct if, with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: Engages in fighting or threatening, or in violent or tumultuous behavior, makes unreasonable noise, uses obscene language, or makes an offensive gesture or creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

As used in this section, the word public means affecting or likely to affect persons in a place to which the public or a substantial group has access. Among the places included are highways, or any neighborhood or any premises which are open to the public.

Also relevant in this case is Section 5507. In Pennsylvania a person who has no legal privilege to do so intentionally or recklessly obstructs any

highway, walkway, or other public passage, whether along or with others, commits a summary offense, in case he persists after warning of law officers, a misdemeanor of the third degree. No person shall be deemed guilty of an offense under this section solely because of the gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.

A person in the gathering commits a summary offense if he refuses to obey a reasonable official request or order to move to prevent obstruction of the highway or public passage or to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by police control of the size or location of the gathering.

As used in the section, the word obstructs means renders impassable without unreasonable inconvenience or hazard.

Now, I will instruct you as to damages.

The mere fact that I am instructing you as to damages does not mean that you must find damages. If, however, you determine that any of the defendants are liable to the plaintiff, you must award the plaintiff such money damages which you believe

will favorably and justly compensate the plaintiff for all the emotion and other damages sustained as a direct result of the conduct of the defendants.

You must determine plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate plaintiff for the deprivation of his civil rights. Damages must not be based on speculation or sympathy. They must be based on evidence presented at the trial and only that evidence.

You should consider, to the extent you find them by a preponderance of the evidence, plaintiff's emotional pain and mental anguish.

You are not to award damages for any injury or condition for which a plaintiff may have suffered unless it is established by a preponderance of the evidence in this case that such injury or condition was proximately caused by the actions in question.

If you find in favor of the plaintiff, but you find that his damages have no monetary value, then you must render a verdict for him in a nominal amount of $1.

Counsel, is it necessary to put anything further on the record before I continue?

MR. MCELHATTON: No, your Honor.

MS. PEARSON: No.

MR. CONSIDINE: Not at this time, your Honor.

THE COURT: To reach a verdict, all of you must agree. Your verdict must be unanimous as to each claim. Your deliberations will be secret. You will never have to explain your verdict to anyone. It is your duty to consult with one another and to deliberate in an effort to reach an agreement if you can do so. Each of you must decide the case for yourself, but only after impartial consideration of the evidence with your fellow jurors.

During your deliberations, do not hesitate to re-examine your own opinions or change your mind if convinced you are wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember, at all times that you are the judges, the judges of the facts. Your sole interest is to seek the truth from the evidence and to decide whether the plaintiff has proved each of the claims by a preponderance of the evidence.

Upon retiring to the jury room, your first order of business will be to select that person who will act as foreperson. Your foreperson will preside over your deliberations and will be your spokesperson here in court. You will receive a verdict form which has been

prepared for your convenience. You will take that verdict form to the jury room and when you have reached a unanimous agreement as to the verdict, you will have your foreperson sign it – fill it in, and sign it and date it and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the court, please reduce your message or question to a writing signed by the foreperson and pass the note to my deputy clerk who will bring it to my attention. I will then respond as promptly as possible, either in writing or having you return to the courtroom where I can address you orally. But I caution you, in any message or question that you might send, at no time should you state or specify your numerical division.

There are a couple things I want to tell you in closing. Number 1, if you wish to have a copy of the instructions, all you have to do is ask for it and I will pass the instruction on to you. I don't expect you to have memorized them. I don't memorize them. As you see, I'm reading them to you to make sure I get them right. If you want to have a copy of the instruction, all you have to do is ask.

Also, if you wish to see any exhibits, just describe any exhibit that you want to see. You don't have to remember the number or whose exhibits it was, just describe it as best you can and the exhibits will be given to you. But I'm only going to give you what you ask for. So, if you don't ask for anything, you don't get anything. If you ask for everything, you

get everything. So again, you make your requests through your foreperson in writing.

And with that I will send you to the jury room to begin your deliberations.

(at 12:45 p.m., the jury left the courtroom.)